TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 16, 1900.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

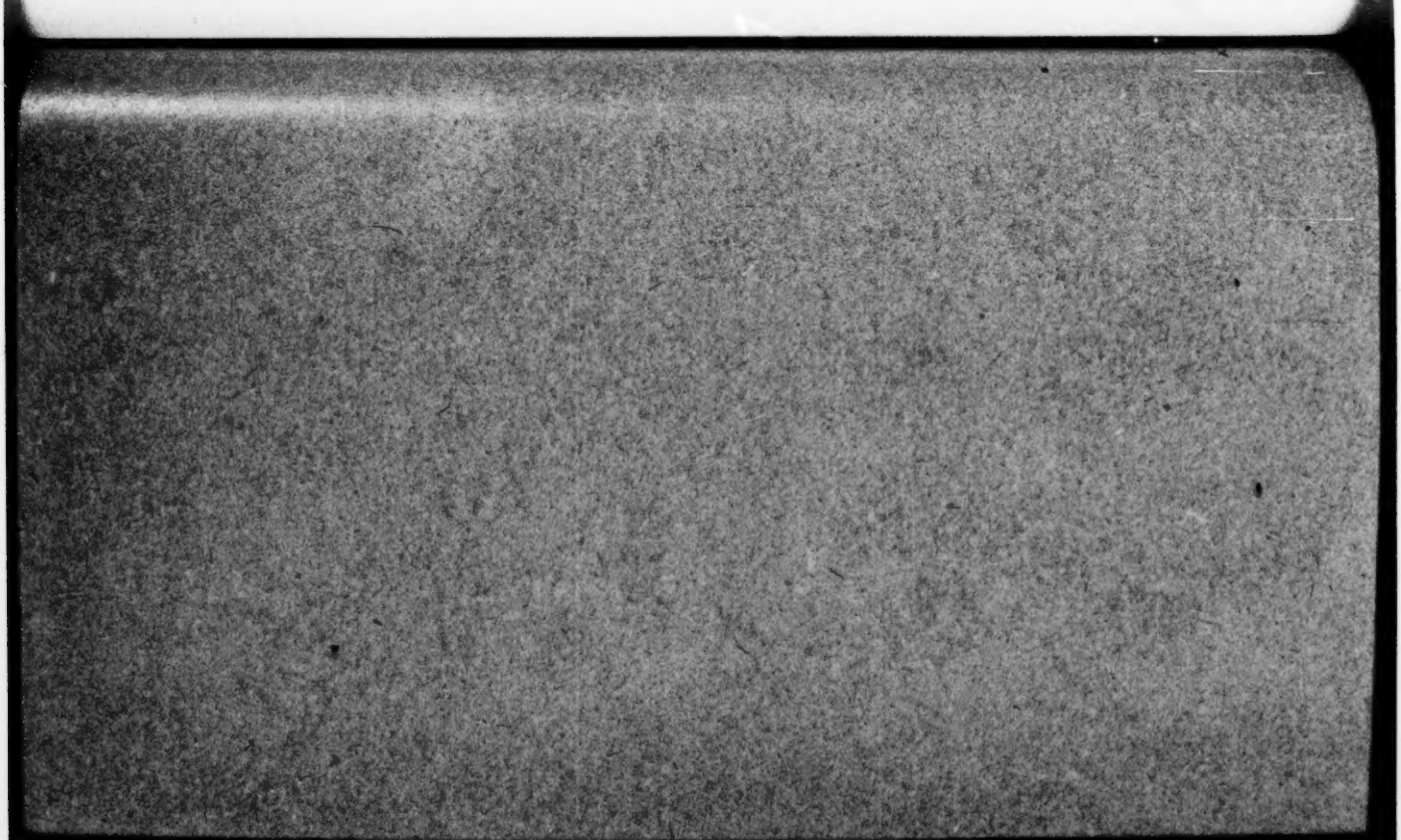
vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES R. LYNDE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JULY 8, 1900.

(16,331.)



(16,331.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 552.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES R. LYNDE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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a Supreme Court of Ohio.

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
CHARLES R. LYNDE *et al.*

Error to the Circuit Court of Franklin County. No. 3570.

STATE OF OHIO,
City of Columbus, } *ss:*

To the honorable Supreme Court of the United States:

Pursuant to the command of your within writ of error, directed to us, we, under our seal, distinctly and openly, the record and proceedings mentioned within, with all things concerning the same, before the judges within named in a certain authenticated transcript to this writ attached, do send as within we are commanded.

In witness whereof I, Josiah B. Allen, clerk of the supreme court of Ohio, have set my hand and seal of said court this 3rd day of July, A. D. 1896.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By GEO. H. KOLKER, *Deputy.*

b UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Ohio, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, plaintiff in error, and The Long Island Loan and Trust Company, executor of the last will and testament of Charles R. Lynde, deceased, and others, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened,

c

to the great damage of the said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within — days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

July 1st, 1896.

d Copy.

In the Supreme Court of the United States.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY Company, a Corporation under the Laws of Pennsylvania, Ohio, Indiana, and Illinois, Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, a Corporation under the Laws of the State of New York, Executor of the Last Will and Testament of Charles R. Lynde, Deceased; The Columbus, Chicago and Indiana Central Railway Company, a Corporation under the laws of Ohio, Indiana, and Illinois; Archibald Parkhurst, Trustee; The Union Trust Company, a Corporation under the Laws of New York; The Farmers' Loan and Trust Company, a Corporation under the Laws of New York; The Pennsylvania Company and The Pennsylvania Railroad Company, Corporations under the Laws of Pennsylvania; W. N. Jackson, Trustee; Conrad Baker, Trustee; Frederick R. Fowler, and Joseph T. Thomas, Trustees, Defendants in Error.

Bond in Error.

Know all men by these presents that we, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, as principal, and David S. Gray, as surety, are held and firmly bound unto the defendant The Long Island Loan and Trust Company, executor of the last will and testament of Charles R. Lynde, deceased, in the

full and just sum of twenty thousand dollars, to be paid to the said defendant, The Long Island Loan and Trust Company, executor as aforesaid, its successors or assigns; to which payment, well
e and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 29th day of June, A. D. 1896.

Whereas lately, in the supreme court of the State of Ohio, in a suit depending in said court between The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, plaintiff in error, and The Long Island Loan and Trust Company, executor of the last will and testament of Charles R. Lynde, deceased, and others, a decree was rendered against the said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company in favor of the said The Long Island Loan and Trust Company, executor as aforesaid, and the said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company having obtained a writ of error in the Supreme Court of the United States to reverse the decree in the aforesaid suit:

Now, the condition of the above obligation is such that if the said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
By J. T. BROOKS, *Vice-President.*

{Seal The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. Incorporated, 1890.}

Attest: S. B. LIGGETT, *Secretary.*
DAVID S. GRAY. [SEAL.]

Sealed and delivered in presence of—
CHAS. E. BURR, as to D. S. Gray.

Witnesses to the signatures of J. T. Brooks and S. B. Liggett:
E. S. BEATTY.
L. L. GILBERT.

1 STATE OF OHIO, } ss:
Franklin County, }

David S. Gray, the subscriber to the foregoing bond, being duly sworn, deposes and says that he resides in the city of Columbus, Franklin county, Ohio, and is a householder in said city; that he is worth at least the sum of fifty thousand dollars over all his debts and liabilities and exclusive of property exempt by law from execution.

DAVID S. GRAY.

Sworn to before me and subscribed in my presence by the said David S. Gray this 29th day of June, 1896.

[Notarial Seal, Franklin County, Ohio.]

E. L. McCUNE,
Notary Public, Franklin County, Ohio.

This bond approved and to operate as a supersedeas of the decree appealed from July 1st, 1896.

JOHN M. HARLAN,
Justice Sup. Ct. U. S.

2 UNITED STATES OF AMERICA, *ss:*

To The Long Island Loan and Trust Company, executor of the last will and testament of Charles R. Lynde, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this first day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

3 On this sixth day of July, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared Joseph Lackner before me, the subscriber, a notary public in and for Hamilton county, Ohio, and makes oath that he delivered a true copy of the within citation to E. W. Kittredge, counsel for the Long Island Loan and Trust Company, this sixth day of July, 1896, at the request of Lawrence Maxwell, Jr., counsel for the plaintiff in error.

JOS. L. LACKNER.

Sworn to and subscribed the 6th day of July, A. D. 1896.

[Notarial Seal, Hamilton County, O.]

BEN. B. NELSON,
Notary Public, Hamilton County, Ohio.

4 Supreme Court of Ohio.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
CHARLES R. LYNDE, THE COLUMBUS, CHICAGO AND INDIANA CENTRAL Railway Company; Archibald Parkhurst, Trustee; The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, The Pennsylvania Railroad Company; W. N. Jackson, Trustee; Conrad Baker, Trustee; Frederick R. Fowler and Joseph T. Thomas, Trustees, Defendants in Error.

Record.

In error to the circut court of Franklin county, Ohio.

Watson, Burr & Livesay, attorneys for plaintiff in error.

Filed Jun- 14, 1893, in supreme court of Ohio.
J. B. ALLEN, *Clerk.*

5 Supreme Court of Ohio.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
CHARLES R. LYNDE, THE COLUMBUS, CHICAGO AND INDIANA CENTRAL Railway Company; Archibald Parkhurst, Trustee; The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, The Pennsylvania Railroad Company; W. N. Jackson, Trustee; Conrad Baker, Trustee; Frederick R. Fowler and Joseph T. Thomas, Trustees, Defendants in Error.

Petition in Error.

Filed April 21, 1893.

Plaintiff says that in an action lately pending in the circuit court within and for Franklin county, Ohio, wherein the plaintiff in this action was plaintiff and the defendants herein were defendants, the defendant, Charles R. Lynde, by the consideration of said court at its January term, 1893, recovered a judgment against the plaintiff herein affirming a certain judgment of the court of common pleas of said Franklin county, wherein the said Charles R. Lynde was plaintiff and the said Pittsburgh, Cincinnati, Chicago and St.
6 Louis Railway Company and the defendants herein other than the said Charles R. Lynde were defendants.

Duly certified transcripts of the docket and journal entries in said cause in the courts below together with the original papers and pleadings are herewith filed.

Plaintiff says that in said judgment and proceedings in said circuit court there is manifest error to its prejudice in this, to wit:

First. The said court erred in affirming the said judgment of the common pleas court.

Second. The said court erred in not reversing the said judgment of the court of common pleas.

Third. The judgment of the said circuit court and its finding that there was no error in the record and proceedings of the common pleas court prejudicial to the plaintiff in error were contrary to law.

Fourth. Other errors apparent on the record.

Wherefore the plaintiff herein prays that the said finding and judgment of the circuit court and court of common pleas may be reversed and that the plaintiff herein may be restored to all things it has lost by reason thereof, and that this court make such other orders as may be right and proper in the premises.

WATSON, BURR & LIVESAY,
Attorneys for Plaintiff in Error.

The defendant, Charles R. Lynde, waives the issuing and service of summons in error in the above cause and enters his appearance therein.

CHARLES R. LYNDE,
Defendant in Error,
By KITTRIDGE, WILBY & SIMMONS,
His Attorneys.

7 STATE OF OHIO, }
County of Franklin. }

Court of Common Pleas.

CHARLES R. LYNDE, Plaintiff,
vs.
THE COLUMBUS, CHICAGO AND INDIANA CENTRAL RAILWAY COMPANY, a Corporation Organized under the Laws of Ohio; Archibald Parkhurst, Trustee; The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, a Corporation Organized under the Laws of Pennsylvania; The Pennsylvania Railroad Company, a Corporation Organized under the Laws of Pennsylvania; W. N. Jackson, Trustee; Conrad Baker, Trustee, and Frederick R. Fowler and Joseph T. Thomas, Trustees, Defendants.

Petition.

(Filed July 3, 1891.)

The plaintiff above named, Charles R. Lynde, says, that on or about the 1st day of November, A. D. 1864, the Columbus & Indianapolis Central Railway Company was a corporation duly organ-

ized under the laws of the State of Ohio, and had its principle place of business therein.

Plaintiff further says, that on or about the 1st day of November, A. D. 1864, the said The Columbus & Indianapolis Central
8 Railway Company made and issued its certain series of bonds, numbered consecutively from one to one thousand, inclusive, for one thousand dollars ($1,000) each; all of which bonds were duly signed by the president of the company and sealed with the corporate seal and attested by the secretary thereof; and each of said bonds was in the words and figures following to wit:

(One dollar revenue stamp.)

"No. 946. UNITED STATES OF AMERICA. $1,000.

The Columbus & Indianapolis Central Railway Company, States of Ohio and Indiana.

Second Mortgage Sinking Fund Bond.

Know all men by these presents, that the Columbus & Indianapolis Central Railway Company is indebted to William D. Thompson, of the city of New York, or bearer, in the sum of one thousand dollars, lawful money of the United States, which the said company promises to pay to him or to the bearer hereof on the 1st day of November, in the year one thousand nine hundred and four, in the city of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually in the city of New York, on the 1st days of May and November of each year on the presentation and surrender of the coupons hereto annexed as they severally become due, and in case of the non-payment of any half-yearly installment of interest which shall have become payable and shall have been demanded, if such default shall continue for six months after the maturity of the said installment, the principle of this bond shall become due in the manner and with the effect specified
9 in the deed of trust securing such payment. This bond is one of an issue of not exceeding $1,000,000, and has a special lien on all of the railway property, equipments and franchises of the said company, as mentioned in the deed of trust securing its payment, subject to prior mortgage liens of $3,200,000.

The holder hereof will also be entitled to the benefit and security of a sinking fund of five thousand dollars provided for and described in said deed of trust to be set apart annually for investment out of the earnings of said company for the redemption of the one million dollars secured by said deed of trust. This bond shall be transferable by delivery, or it may be registered as to its ownership on a registry to be kept by the company, and being so registered, it shall then be transferable only on the books of the company until released from such registry on said books by its owner. This bond shall not become obligatory until it shall have been authenticated by a certificate annexed to it, duly signed by the trustee.

In witness whereof, the said railway company has caused its corporate seal to be hereto affixed and the same to be attested by the

signatures of its president and secretary, and has also caused the coupons hereto annexed to be signed by its secretary, the 1st day of November, in the year of our Lord, eighteen hundred and sixty-four.

[SEAL.] G. MOODIE, *Secretary.*
B. E. SMITH, *President.*

COLUMBUS & INDIANAPOLIS CENTRAL RAILWAY COMPANY, OHIO AND IND.

I hereby certify that this bond is one of the series of bonds described in and secured by the deed of trust or mortgage above mentioned.

A. PARKHURST, *Trustee.*"

10 Plaintiff further says, that there were annexed to each of said bonds, coupons, payable to bearer semi annually in the city of New York, on the 1st days of May and November of each year on the presentation and surrender of the coupons so annexed, as they severally became due for each semi-annual installment of interest from and after the 1st day of November, A. D. 1864, to and including the 1st day of November, 1904.

Plaintiff further says, that the said coupons on each of said bonds for the interest coming due on the 1st day of May, A. D. 1865, was in the words and figures following, to wit:

"$35. *Second Mortgage Interest Warrant.* $35.

Due May 1st, 1865.

The Columbus & Indianapolis Central Railway Company will pay to bearer, in the city of New York, thirty-five dollars, being six months' interest on its bond.

No. —. G. MOODIE, *Secretary.*"

Plaintiff further says, that each of said coupons upon each of said bonds was in the same words, except that the date of maturity was the 1st day of May and November in each year until the maturity of said bonds and the number of the bond to which the coupon was attached was inserted in each coupon.

Plaintiff further says, that he is the owner and holder of thirty-six (36) of the said bonds hereinbefore described, to wit: Numbers 893, 894, 895, 896, 897, 898, 899, 905, 906, 907, 908, 909, 910, 914, 915, 916, 917, 918, 919, 920, 942, 943, 946, 948, 949, 950, 966, 967, 968, 969, 970, 976, 977, 978, 979, 980.

11 Plaintiff further says, that there are no credits or endorsements on any of said bonds or coupons; and that on the 27th day of August, A. D. 1878, the said bonds were duly registered by the defendant, The Columbus, Chicago & Indiana Central Railway Company in accordance with the provisions in said bonds contained and thereby made payable to this plaintiff and transferable by him.

Plaintiff further says, that on or about the 11th day of September, A. D. 1867, the Columbus & Indianapolis Central Railway Company was consolidated with the Union & Logansport Railroad Company and the Toledo, Logansport & *and* Burlington Railroad Company, under the laws of the State of Ohio, into and became the Columbus & Indiana Central Railway Company, which was a corporation thus organized under the laws of Ohio.

Plaintiff further says, that on or about the 1st day of February, 1868, the Columbus & Indiana Central Railway Company and the Chicago & Great Eastern Railroad Company were consolidated under the laws of the State of Ohio, into and under the name of the Columbus, Chicago & Indiana Central Railway Company, one of the defendants in this case.

Plaintiff further says, that by reason of said consolidation and under the laws of the State of Ohio, the said, The Columbus, Chicago & Indiana Central Railway Company became, and is liable for the payment of the bonds and coupons aforesaid, to the same extent as if such debts, liabilities and duties had been contracted by it; and the said defendant neglected and refused to pay each of the coupons upon each of said bonds from and including the 1st day of May, A. D., 1879, to and including the 1st day of May, A. D. 1891.

12 Plaintiff further says, that on the 1st day of May, A. D. 1891, this plaintiff commenced his action of law against the Columbus, Chicago & Indiana Central Railway Company in the circuit court of the United States for the southern district of Ohio, eastern division, being cause No. 560 on the docket of said court for the recovery of the amount due to him with interest upon each of the said semi-annual coupons attached to each of said bonds maturing and becoming due on the first days of May and November in each year from 1879 to and including the first day of May, A. D. 1891.

Plaintiff further says, that such proceedings were had in said cause as that at the June term, A. D. 1891, of said circuit court of the United States, by the consideration of said court this plaintiff recovered a judgment against the said The Columbus, Chicago & Indiana Central Railway Company for the sum of forty-two thousand nine hundred and ninety-seven dollars and seventy-five cents ($42,997.75) with interest thereon from the second day of June, A. D. 1891 and his costs in that behalf taxed at $88.65.

Plaintiff further says, that the said judgment still remains in full force unreversed and unsatisfied and that there is due from the said The Columbus, Chicago & Indiana Central Railway Company to this plaintiff thereon the said sum of $42,997.75, with interest thereon from the second day of June, A. D. 1891, and for the sum of $88.65 as costs in that behalf expended.

Plaintiff further says, that at the time of the consolidation of the said The Columbus & Indianapolis Central Railway Company, as hereinbefore set forth, the said The Columbus & Indianapolis Central Railway Company was the owner of and operating a railroad,

extending from Columbus in Franklin county, Ohio, to In-
13 dianapolis in Marion county, Indiana, and including the branch from Covington to Union and its franchises, equipment, property tolls and interests, that is to say the lands, tenements, hereditaments, fixtures, goods and chattels of said The Columbus & Indianapolis Central Railway Company, its property, rights, privileges, interest and estate of every description and nature, its rails, ties, fences, buildings and erections, its right of way, cars, engines, tools and machinery, its rents, reservations and reversions of every nature including all the property which the said defendant The Columbus & Indianapolis Central Railway Company then possessed with the benefit of all the contracts which the said company had made or by assignment or succession held.

Plaintiff further says, that by reason of the agreement of consolidation hereinbefore set forth and by the force and operation of the statutes of Ohio and Indiana in such case made and provided, a lien arose in favor of the plaintiff to secure the payment of the bonds and coupons thereto attached, upon all the property which the said The Columbus & Indianapolis Central Railway Company at the time owned and by virtue of said agreement of consolidation transferred to the consolidated companies; and that this plaintiff has the right to have the property of the said The Columbus & Indianapolis Central Railway Company so owned and transferred by it, applied to the payment of the judgment recovered by the plaintiff for and on account of the interest coupons heretofore matured recovered by this plaintiff as hereinbefore set forth; and to the payment of the coupons attached to said bonds as the same shall hereafter become due and payable, and to the payment of the principal of said bonds when the same shall have matured and become payable, according to their tenor.

14 Plaintiff further says, that at the time of the execution of the said bonds as hereinbefore set forth, the Columbus & Indianapolis Central Railway Company made and executed its certain deed of trust to the defendant, Archibald Parkhurst, as trustee, whereby it granted and conveyed to the said Archibald Parkhurst as trustee all of the said railroad and its property and franchises as the same are hereinbefore described to have and to hold the same in trust for the persons and corporations and for the benefit, protection and security of the persons or corporations who should hold the said one thousand (1,000) bonds issued by the said The Columbus & Indianapolis Central Railway Company, and for enforcing the stipulations of said company in that behalf in their intent and meaning, whether contained in said bonds or interest warrants or in the said deed of trust, whereby and by reason whereof a lien was created upon all of said property in behalf of this plaintiff to secure the payment of the bonds and the sums due and to become due upon the said interest coupons thereto attached, owned and held by this plaintiff as hereinbefore alleged, which deed of trust was at or about the date thereof duly recorded in the recorder's office in each of the counties in the State of Ohio through or into which said railroad was constructed.

And it is provided, however, among other things in said mortgage that the said trustee should not file a bill for the foreclosure and sale of said premises upon default in the payment of said coupons attached to said bonds or of said bonds as the same became due, unless the same should be requested in writing by the holders of at least three hundred (300) of the said bonds.

Plaintiff further says that the said defendant, The Columbus
15 & Indianapolis Central Railway Company, has paid or caused to be paid as the same matured the interest coupons upon more than seven hundred (700) of the bonds secured and intended to be secured by the said deed of trust and has made default in the payment of the coupons upon less than three hundred of said bonds whereby the holders of three hundred of said bonds are prevented and deterred from uniting with this plaintiff in requesting the said trustee to commence and prosecute an action for the foreclosure and sale of said property and premises.

Plaintiff avers that on or about the 27th day of June, A. D. 1891, at Newark, in the State of New Jersey, he, the said defendant, made a personal request and demand in writing of the said Archibald Parkhurst, as trustee, to commence an action for the foreclosure and sale of said premises in accordance with the provisions of said deed of trust, for and on account of the default made by the said The Columbus & Indianapolis Central Railway Company in the payment of the coupons held by this plaintiff as hereinbefore described; and this plaintiff then and there offered to the said trustee reasonable security and indemnity to protect him against all expenses and personal responsibility by him to be made and incurred in the commencement and prosecution of an action for the foreclosure and sale of said premises. That the said Archibald Parkhurst, as such trustee, then and there refused to take any action in the matter as requested by this plaintiff.

Plaintiff further says, that the said defendants, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, The Pennsylvania Railroad Company, W. N. Jackson, trustee, Conrad Baker,
16 trustee, and Frederick R. Fowler and Joseph T. Thomas, trustees, have or claim to have some interest in the property and premises hereinbefore described.

Wherefore plaintiff prays, that the said defendants and each of them may be required to answer and set forth what title or interest they may have in the property herein described. Plaintiff prays that a receiver may be appointed by the court to take possession of the property hereinbefore described and to hold and operate the same until the same shall be sold by order of this court. Plaintiff further prays, that the said premises and property may be decreed to be sold free and discharged from all claim or interest of the parties herein or either of them, and that the proceeds of said sale may be applied under the order of the court to the payment of the judgment heretofore recovered by this plaintiff against the said defendant, The Columbus, Chicago & Indiana Central Railway Company,

as hereinbefore set forth and to the payment of the interest coupons and the principal of the said bonds held by this plaintiff as the same shall become due and payable, and for all other proper relief in the premises.

KITTRIDGE & WILBY,
Plaintiff's Attorneys.

(Duly certified.)

17 *Answer and Cross-petition of the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.*

(Filed Oct. 14, 1891.)

Now comes the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, leave having first been obtained and for its answer and cross-petition, says:

First Defense.

Defendant denies that on or about the 1st day of November, or at any other time, the Columbus & Indianapolis Central Railway Company made or issued the entire series of bonds described in the petition or that any more than eight hundred and twenty-one bonds of the said series were ever made or issued; and says that none of the thirty-six bonds described in the petition as owned by the plaintiff were among the eight hundred and twenty-one so issued, and defendant says that none of the said thirty-six bonds were ever issued by the said Columbus & Indianapolis Central Railway Company or by any of its successors in the consolidations described in the petition. Defendant has no knowledge whether the remainder of said bonds were ever signed by the president of said company, or sealed with its corporate seal or attested by the secretary thereof as alleged in the petition. And this defendant for want of knowledge denies each of said allegations; defendant denies that plaintiff is the owner or the rightful holder of the thirty-six (36) of said bonds described in the petition or of any thereof.

As to the following allegations of the petition, to wit:

"That there are no credits or endorsements on any of said
18 bonds or coupons, and that on the 27th day of August, A. D. 1878, the said bonds were duly registered by the defendant The Columbus, Chicago & Indiana Central Railway Company in accordance with the provisions in said bonds contained and thereby made payable to this plaintiff and transferable by him."

This defendant has no knowledge and it therefore denies each of the said allegations. Defendant denies that by reason of the consolidations described in the petition or any of them, under the laws of the State of Ohio or otherwise the said The Columbus, Chicago & Indiana Central Railway Company became or is liable for the payment of the said thirty-six bonds or any of them or of the said coupons or any of them.

Defendant denies that in the action mentioned in the petition in

the circuit court of the United States for the southern district of Ohio, eastern division, such proceedings were had, that at the June term of said court or at any other time the plaintiff recovered a judgment against the said The Columbus, Chicago & Indiana Central Railway Company upon the said coupons or any thereof for the said sum of $42,997.75 or for any other sum.

Defendant says, that in said action on or about the 1st day of May, 1891, process of summons was issued for the said The Columbus, Chicago & Indiana Central Railway Company to the marshal of said district, who thereafter returned the same as served by delivering to G. Moodie, formerly secretary of said company, a true copy of said writ. That afterwards, on or about the 15th day of May, 1891, a second or alias writ of summons in said cause was issued against the said defendant corporation to the marshal of said district who thereafter returned the same as served upon said company by delivering a copy thereof to Gordon Moodie, as secretary and treasurer of the said company.

19 No other service of summons in said action was ever made upon the said railway company than as above set forth.

This defendant further says, that at the dates of said pretended service of summons the said Gordon Moodie was not and for many years had not been the secretary, treasurer or other officer of the said railway company. And the said The Columbus, Chicago & Indiana Central Railway Company was never served with summons in said action, and never appeared therein by attorney or otherwise.

Defendant denies that there is due the plaintiff from the said The Columbus, Chicago & Indiana Central Railway Company upon said pretended judgment, or upon said bonds or coupons the said sum of $42,997.75 with interest from the 2nd day of June, 1891, and the sum of $88.65 as costs in said action, or any other sum whatsoever.

Defendant denies that by reason of the consolidations described in the petition or any of them or by force or operation of the statutes of Ohio or Indiana or otherwise, a lien arose in favor of the plaintiff to secure the payment of the bonds or the coupons described in the petition and claimed to be owned by the plaintiff or any thereof upon the property then owned by the Columbus and Indianapolis Central Railway Company as alleged in the petition or any thereof, or that the plaintiff has the right to have any of said property applied to the payment of the said pretended judgment, or to the payment of any of said bonds or coupons not yet matured.

Defendant denies that by reason of the mortgage made by the said Columbus and Indianapolis Central Railway Company, a lien was created upon its said property or any thereof on behalf of the plaintiff to secure the payment of the said thirty-six bonds alleged to be owned by the plaintiff, or any thereof, or any of the coupons thereto attached.

20 *Second Defense.*

Defendant says, that none of the said thirty-six bonds or the coupons thereto attached were ever issued, negotiated, or sold by or on behalf of the said Columbus & Indianapolis Central Railway Company, or by or on behalf of any of its corporate successors into which by consolidation the said corporation became merged, nor sid the said Columbus & Indianapolis Central Railway Company or any of its said corporate successors ever receive any of the prodeeds thereof, or derive any benefit from the same; but after the said Columbus & Indianapolis Central Railway Compony had by cuccessive consolidations become merged into the said Columbus, Chicago & Indiana Central Railway Company, and on or about the month of May, 1878, the said bonds with the said coupons attached were, without the knowledge or consent of the said Columbus, Chicago & Indiana Central Railway Company abstracted from its possession by one B. E. Smith, and if the same or any thereof were negotiated or sold, it was done without the knowledge or consent of the said company as aforesaid.

Wherefore, defendant says, the said bonds and coupons were wholly without consideration, and were not and never became the obligations of the said Columbus, Chicago & Indiana Central Railway Company.

Third Defense and Cross-petition.

Defendant admits that on or about the first day of November, A. D. 1864, the said Columbus & Indianapolis Central Railway Company executed and delivered its certain mortgage or trust deed of that date to the said Archibald Parkhurst, trustee, for the
21 purpose of securing the payment of a series of one thousand bonds of one thousand dollars each, and the interest thereon as alleged in the petition. But the said railway company issued and sold eight hundred and twenty-one of said bonds and no more. None of the said thirty-six bonds described in the petition and alleged to be owned by the plaintiff were among the number so issued and sold.

Defendant further says, that on or about the 10th day of September, 1867, the said The Columbus & Indianapolis Central Railway Company was consolidated with the Union & Logansport Railroad Company, and the Toledo, Logansport & Burlington Railway Company into and became the Columbus & Indiana Central Railway Company. On or about the 12th day of February, 1868, the said The Columbus & Indiana Central Railway Company and the Chicago & Great Eastern Railway Company were consolidated into and became the said The Columbus, Chicago & Indiana Central Railway Company, one of the defendants herein.

On or about the 20th day of February, 1868, the said The Columbus, Chicago & Indiana Central Railway Company made its mortgage or deed of trust of that date to James A. Roosevelt and William

R. Fosdick, trustees, conveying to them all of its property including all that which formerly belonged to the said Columbus & Indianapolis Central Railway Company, described in the petition, for the purpose of securing the payment of fifteen thousand bonds of the said company, of one thousand dollars each, dated on the said 20th day of February, 1868, and due upon the 1st day of April, A. D. 1908, with interest at seven per cent. per annum, payable semi-annually.

By the terms of said mortgage, the maker thereof further
22 covenanted and agreed with said trustees and their successors, and with the holders of said bonds, to create and make a sinking fund for the redemption of said bonds by setting aside and depositing with a sinking-fund commissioner or commissioners to be appointed by said railway company for that purpose from and after the 1st day of April, 1870, and annually thereafter until the maturity of said bonds, from the net earnings of said road and property, an amount of money equal to the one-half of one per cent. of the principal—amount of all such bonds thereby secured, which should then be outstanding. Immediately thereafter, the said mortgage was duly recorded in the several counties, in the States of Ohio, Indiana and Illinois, through or into which the said railroad ran and was situated.

Afterwards and before the beginning of the foreclosure suit hereinafter mentioned, the said The Columbus, Chicago & Indiana Central Railway Company, issued and sold bonds so secured by said mortgage to the amount of ten million four hundred and twenty-eight thousand dollars or more.

On or about the 15th day of December, 1868, the said The Columbus, Chicago & Indiana Central Railway Company made its second mortgage or deed of trust upon all said property to Frederick R. Fowler and Joseph T. Thomas, trustees, for the purpose of securing the payment of five thousand bonds of said company of one thousand dollars each, dated the said 15th day of December, 1868, and due upon the 1st day of February, A. D. 1909, with interest at seven per cent. payable semi-annually. Immediately thereafter the said mortgage was duly recorded in the several counties in the States of Ohio, Indiana and Illinois, through or into which the said "railroad ran or was situated."

It was recited in said mortgage that the said Columbus, Chicago & Indiana Central Railway Company was indebted for out-
23 standing bonds in the sum of eight hundred and twenty-one thousand dollars of the second-mortgage bonds of the Columbus & Indianapolis Central Railway Company being the mortgage described in the petition and the said eight hundred and twenty-one thousand dollars being the eight hundred and twenty-one bonds hereinbefore mentioned. And the said mortgage to Fowler and Thomas, trustees, was made and the bonds thereunder issued and sold to the amount of more than one million two hundred and fifty-eight thousand dollars subject to the said eight hundred and twenty-one thousand dollars of the said issue and no more.

On or about the 22d day of January, A. D. 1869, in consideration

of certain rentals to be paid by the lessee and of other considerations the said Columbus, Chicago & Indiana Central Railway Company by its indentures of lease of that date demised and leased to the Pittsburgh, Cincinnati & St. Louis Railway Company its entire railroad and property used in connection therewith, including the railroad property described in the petition, together with all the rights, privileges and appurtenances thereto belonging with the right to use its franchises and privileges of every character, for the term of ninety-nine years from the 1st day of February, 1869; renewable forever. And on or about the first day of February, 1869, possession of all said railroad and property was delivered to the said Pittsburgh, Cincinnati & St. Louis Railway Company, which company continued to hold possession thereof and to operate the same until after the sale of the said property and railroad as hereinafter set forth.

On or about the 1st day of February, 1875, in the circuit court of the United States, for the southern district of Ohio, and on or about the 2nd day of February, 1875, in the circuit courts of the
24 United States, for the district of Indiana and for the northern district of Illinois, in which several districts the said railroad was situated, the said James A. Roosevelt and William R. Fosdick filed their bills in chancery, being in substance the same, against the said The Columbus, Chicago & Indiana Central Railway Company, Frederick R. Fowler, Archibald Parkhurst and John B. Thompson, wherein they recited the mortgage made by the said railway company to them, and the issue and sale of bonds thereunder, alleging therein the insolvency of the said railway company, its entire failure to make or provide any part of the sinking fund in said mortgage to them mentioned, its failure to pay the interest on underlying mortgages prior to the mortgage to said Roosevelt and Fosdick, setting out therein also the said lease to the Pittsburgh, Cincinnati & St. Louis Railway Company, and alleging that said lease by reason of the rentals therein reserved and secured was valuable for the interest of the complainants and the bondholders whom they represented, and praying in said bills for a decree requiring said railway company to make and set aside the said sinking fund, for the foreclosure of complainant's said mortgage, and for the appointment of a receiver or receivers of all and singular, the said railroad equipment and appurtenances and all the premises embraced in and covered by the said mortgage to them, and of the earnings, income, rents, issues and profits thereof; and asking that in said order the said receivers be directed not to disturb the physical possession of said property by the said lessee, The Pittsburgh, Cincinnati & St. Louis Railway Company, but that said receivers be authorized and directed to receive, sue for and collect all the rental therein reserved and apply the same as the court might direct.

25 In said actions, the defendants were all duly served with process according to law or appeared therein except the said Joseph T. Thomas. The said defendants, Frederick R. Fowler and Joseph T. Thomas, were the trustees to whom the second mortgage

hereinbefore described, had been made by the said Columbus, Chicago & Indiana Central Railway Company. Shortly after the filing of said bills of foreclosure by the said Roosevelt and Fosdick, and before the decree of foreclosure and sale hereinafter described was made therein, the said Joseph T. Thomas resigned his office as trustee under said mortgage, and did not thereafter act as such, and for that reason was not served with process in said actions. Such proceedings were had in said causes, that on or about the 2nd day of February, 1875, the said James A. Roosevelt and William R. Fosdick were duly appointed receivers of said railroad, its equipments and appurtenances and all the premises embraced in and covered by the said mortgage and of the earnings, income, rents, issues and profits thereof, and said receivers were directed, until the further order of the court, they should not disturb the possession of said mortgaged premises by the said Pittsburgh, Cincinnati & St. Louis Railway Company under said lease, but should collect and receive the rental payable by said lessees and should apply the same as should be provided by the further orders of the court.

In said order appointing the said receivers it was further ordered that the defendant, The Columbus, Chicago & Indiana Central Railway Company by its proper officers in that behalf should forthwith transfer and convey to the said receivers the said railroad, its equipments and appurtenances and all the premises embraced in and covered by the said mortgage, and all such income, rents, issues and profits thereof.

26 Immediately thereafter, in pursuance of the said order, the said receivers took possession and control of all said railroad and property, its income, rents, issues and profits to the same extent that the said Columbus, Chicago & Indiana Central Railway Company could have possessed, used, occupied or controlled the same had said foreclosure suit not been begun, and said receivers continued in said possession and control until after the sale of the said railroad and property as hereinafter set forth, whereby the said Columbus, Chicago and Indiana Central Railway Company from the second day of February, 1875, was divested of all its property and resources of every kind, and of the use and enjoyment or control thereof, and of the use of all its said rights and franchises.

Defendant further says, that if the said thirty-six bonds claimed by the plaintiff to be owned by him, or any of them, were ever at any time issued and sold by the maker thereof, The Columbus & Indianapolis Central Railway Company or by either of its said corporate successors, they were issued and sold by the said The Columbus, Chicago & Indiana Central Railway Company in the year 1878, and about the month of May thereof, and during the pendency of said foreclosure suit, and while said corporation was in the hands of the said receivers as hereinbefore set forth.

Therefore, and by reason of the premises, defendant says, that by the issue of said bonds as above alleged, no lien at any time attached to any of the railroad or property described in the petition for the security of said thirty-six bonds or any thereof, but that if

by said issue any such lien did at any time attach to any of said property as between the said Columbus, Chicago & Indiana Central Railway Company and the holder of the said bonds such lien attached as of the date of the issue and sale of the same, and not earlier.

27 Defendant further says, that in said foreclosure suits such proceedings were had that on or about the 15th day of November, 1882, in the circuit court of the United States, for the northern district of Illinois, and on the 16th day of November, 1882, in the circuit court for the district of Indiana, and on the 23d day of November, 1882, in the circuit court for the southern district of Ohio, similar decrees were entered, wherein it was found that the said allegations of the bills of foreclosure were true, and that the said railway company had made default in the payment of interest upon said bonds secured by the said mortgage to Roosevelt and Fosdick, complainants therein, to wit: The installments of interest which fell due on the 1st day of April, 1875, and each and every installment of interest thereafter, and that no part of the same had been paid. And the said court- further found that said railway company had wholly failed to comply with the agreement in said mortgage to create and make the said sinking fund, and that said company had not made or provided any such sinking fund to any extent whatever, but in that behalf had wholly failed and made default. And the said courts further found the said railway company to be insolvent, that the amount then due by reason of the non-payment of said interest was the sum of four million, eight hundred and thirty-four thousand, two hundred and thirty and twenty-three one-hundredths dollars.

In said decree it was ordered and adjudged that in case the said railway company failed for ten days from the date thereof to pay the said sum, the property conveyed by said mortgage including the railroad and property described in the petition should be sold for the payment of the interest and principal of said bonds.

28 In said decrees it was further ordered and adjudged that the said property should be sold free and clear from the lien of the said mortgage to the said Roosevelt and Fosdick and of all liens created subsequent to the date thereof; and it was in said decrees further considered and adjudged that the purchaser or purchasers at said sale should in respect of said mortgaged premises be invested with and hold, possess and enjoy the same and all the rights, privileges and franchises thereto appertaining as fully and completely as the said Columbus, Chicago & Indiana Central Railway Company at the commencement of said foreclosure suits held the same.

And in said decree it was further considered and adjudged that the sale so ordered to be made and the conveyance after confirmation thereof to be executed and delivered in pursuance of said decree should be valid and effectual forever, and that thereby the defendants in the said suits respectively and all persons claiming or to claim under them or any of them subsequent to the beginning of the said foreclosure suits, as purchasers, incumbrance-s or other-

wise howsoever, should be and thereby were forever barred and foreclosed of and from all right, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold and every or any part thereof.

Defendant further says, that thereafter, on the 10th day of January, 1883, the said railway company having failed to pay the said sum as ordered by the said courts, and in pursuance of said decree and in accordance therewith and upon an order of sale theretofore issued for that purpose from said courts, the said property and every part thereof was sold by William P. Fishback, master in chancery of the circuit court for the district of Indiana, and Jacob D. Cox,
special master commissioner theretofore appointed to execute
29 the said order of sale, conjointly with said Fishback by the decree of the circuit court for the southern district of Ohio, unto William L. Scott, Charles J. Osborn and John S. Kennedy, for the sum of thirteen million five hundred thousand dollars, which sum was insufficient to pay the outstanding bonds and the interest then accrued thereon, secured by the said mortgage to the said Roosevelt and Fosdick.

Afterwards, and on or about the 30th day of January, 1883, in the circuit court in the northern district of Illinois, and for the district of Indiana, and on the 31st day of January, 1883, in the circuit court for the southern district of Ohio, the said purchase-money having been paid, there were entered in said causes decrees confirming and approving said sale and ordering the said Fishback, master in chancery, and said Cox as special master commissioner in chancery, to convey to said purchasers in fee-simple all and singular said premises and property rights and franchises in accordance with the former decrees of said courts.

Afterwards, and on or about the 21st day of February, 1883, the said Fishback as master in chancery, and said Cox as special master commissioner, in pursuance of said orders and decrees, did, by their deed of that date, duly convey to the said purchasers, William L. Scott, Charles J. Osborn and John S. Kennedy, in fee-simple all of said premises and property, rights and franchises as fully and completely as they might lawfully do under their said authority and free, clear and discharged of all right, estate and interest, claim, lien and equity of redemption in or to the premises and property, rights and franchises so sold and conveyed, and every or any part thereof of each and every of the defendants to said suits, and of all persons claiming or to claim under them or any of them subsequent to the filing of said bills of foreclosure by said Roosevelt and Fosdick.

30 And this defendant further says, that if a lien at any time attached to any of said property described in the petition for the security of said thirty-six bonds or any thereof, the same was wholly divested and discharged by the proceedings hereinbefore set forth.

Defendant further says, that afterwards on or about the 17th day of March, A. D. 1883, by their deed of that date, the said Scott, Kennedy and Osborn, with their wives respectively, sold and con-

veyed all of said premises and property, rights and franchises for a good and valuable consideration then paid to the Chicago, St. Louis & Pittsburgh Railroad Company, a corporation of the States of Illinois and Indiana, duly authorized to purchase and own the same

On or about the 10th day of June, 1890, the said Chicago, St. Louis & Pittsburgh Railroad Company was duly consolidated according to law with the Pittsburgh, Cincinnati & St. Louis Railway Company, together with other railway companies, under the name of and thereby became The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, this answering defendant. And thereby all and singular the said railroad property and premises, rights and franchises described in the petition become vested in this defendant. Defendant says, that it is now and through its said predecessors in title, has been ever since the conveyance to said Scott, Kennedy and Osborn, in the actual, peaceable and undisputed possession of all said premises, and property, rights and franchises, which include that described in the petition, and this defendant prays that the claim of the plaintiff to have a lien thereon to secure the payment of the said thirty-six bonds and the interest thereon, may be adjudged to be null and void, and that this defendant's title to all said premises and property may be qui-ted against the same.

WATSON, BURR & LIVESAY, *Attorneys.*

31 STATE OF PENNSYLVANIA, } ss:
Allegheny County, }

J. T. Brooks, being duly sworn, says, that he is the second vice-president of the above-named defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and is duly authorized in the premises; that the facts stated and the allegations and denials in the foregoing answer and cross-petition are true as affiant believes.

J. T. BROOKS,
Second Vice-President.

(Duly certified.)

Reply to the Answer and Cross-petition of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

(Filed Oct. 16, 1891.)

Now comes the plaintiff, Charles R. Lynde, and for reply to the answer and cross-petition of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, says, that he denies that at the date named in said answer, Gordon Moody was not the secretary and treasurer of the Columbus, Chicago & Indiana Central Railway Company.

And this plaintiff denies the allegations that the Columbus, Chicago & Indiana Central Railway Company was never served with summons in the action of this plaintiff against the said company.

And this plaintiff denies the allegation of the said answer and

cross-petition that the said bonds, with the said coupons attached, were, without the knowledge or consent of the said The Columbus, Chicago & Indiana Central Railway Company, abstracted from its possession by one B. E. Smith.

32 And this plaintiff denies that said bonds were wholly without consideration.

And this plaintiff denies that the said bonds and coupons thereto attached never became the obligation of the Columbus, Chicago & Indiana Central Railway Company.

And this plaintiff avers that he is and became the *bona fide* holder of said bonds, with the coupons thereto attached, for a good and valuable consideration by him paid therefor, at and before the maturity of the said bonds and coupons, or either of them; and without knowledge or notice of any of the alleged facts in said answer and cross-petition set forth and hereinbefore referred to and denied by this plaintiff.

And this plaintiff, further replying to and answering the said cross-petition of the said defendant, says that he has no knowledge of the alleged mortgage of the Columbus, Chicago & Indiana Central Railway Company, stated in said cross-petition to have been executed on or about the 20th day of February, A. D. 1868, nor of the divers proceedings alleged to have been had thereunder.

And this plaintiff therefore denies each and every allegation in said cross-petition contained, in respect to the said mortgage and said proceedings.

And this plaintiff further says, that he was not, in anywise, a party to the said proceedings and judgments alleged to have been had in the circuit court of the United States for the southern district of Ohio, and in the circuit court of the United States for the southern district of Indiana, and in the circuit court of the United States for the northern district of Illinois; and this plaintiff and his rights are in nowise bound or affected by the said alleged proceedings and judgments.

33 And this plaintiff further replying, denies each and every allegation in said third defense and in said cross-petition contained, not hereinbefore specifically denied.

And this plaintiff annexes hereto and files herewith, his certain interrogatories, which he prays the court may be plainly and fully answered under oath by the secretary and by the treasurer of the said defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

And this plaintiff prays as he has heretofore prayed.

KITTRIDGE & WILBY,
Attorneys for Plaintiff.

(Duly verified.)

Interrogatories to be Answered by the Secretary and Treasurer of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

Int. 1. What is your connection and office with the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and how long have you held that office?

Int. 2. Has the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company ever paid any interest coupons of the bonds of the Columbus & Indianapolis Central Railway Company executed on or about the 1st day of November, A. D. 1864, and referred to in the defendant's answer in this cause? If so, for what years has the said defendant company paid such coupons, what number of coupons has it paid in each year, and what are the serial numbers of the bonds and coupons in each year which the said defendant company has paid?

34 *Motion.*

(Filed Oct. 31, 1891.)

Now comes The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, defendant herein, and moves the court to strike out from the plaintiff's reply herein filed, the following matter to wit:

"And this plaintiff further replying to and answering the said cross-petition of the said defendant, says that he has no knowledge of the alleged mortgage of the Columbus, Chicago & Indiana Central Railroad Company, stated in said cross-petition to have been executed on or about the 20th day of February, A. D. 1868, nor of the divers proceedings alleged to have been had thereunder. And this plaintiff therefore denies each and every allegation in said cross-petition contained, in respect to the said mortgage and said proceedings" for the reason that said matter as therein set forth is irrelevant.

Second. And defendant moves the court to strike from the said reply, the following matter, to wit:

"And this plaintiff further says, that he was not, in anywise, a party to the said proceedings and judgments alleged to have been had in the circuit court of the United States for the southern district of Ohio, and in the circuit court of the United States for the southern district of Indiana, and in the circuit court of the United States for the northern district of Illinois; and this plaintiff and his rights are in nowise bound or affected by the said alleged proceedings and judgments" for the reason that said matter is irrelevant.

WATSON, BURR & LIVESAY, *Attorneys.*

35 *Demurrer to Interrogatories.*

(Filed Oct. 31, 1891.)

Now comes the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and demurs to the interrogatories attached to and filed with the plaintiff's reply herein for the reason that the same and each thereof are irrelevant.

WATSON, BURR & LIVESAY, *Attorneys.*

Amendment to Answer.

(Filed Jan. 12, 1892.)

Now comes the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, leave of the court having first been obtained, and for amendment to its answer herein to be inserted upon the 10th page at the end of line 26 thereof, says:

In pursuance of and in obedience to the order of court hereinabove set forth, the defendant, The Columbus, Chicago & Indiana Central Railway Company, on or about the 25th day of May, 1875, duly executed and delivered its deed to the said William R. Fosdick and James A. Roosevelt, and thereby conveyed to them as such receivers all the railroad, equipment and appurtenances and other premises embraced in and covered by the mortgage to them as trustees, dated the 20th day of February, 1868, hereinbefore mentioned.

WATSON, BURR & LIVESAY, *Attorneys.*

36 *Transcript of Journal Entries.*

(Filed July 29, 1892.)

In the Court of Common Pleas.

I, Wm. H. Simonton, clerk of the court of common pleas, within and for the county of Franklin, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

April Term, July 14, 1891.

Upon application of the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co., leave is granted said company to plead herein by Oct. 1st, 1891.

September Term, October 15, 1892.

Now comes the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and by leave of the court first had and obtained, files its answer and cross-petition herein.

September Term, December 7, 1891.

This day this cause came on to be heard upon the motion of the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, to strike out certain matters from the reply, and was argued by counsel, and the court being fully advised in the premises, do find that said motion ought not to be granted and the same is overruled and thereupon said cause was further submitted to the court upon the demurrer of the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, to the interrogatories annexed to the reply, and the court after argument find the said demurrer not well
37 taken and the same is hereby overruled, to which ruling the said defendant excepts. It is further ordered that the said interrogatories be answered on or before the 26th day of December, 1891.

January Term, January 12, 1892.

On motion of the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co., leave is given to file an amendment to its answer herein and the same is accordingly filed and by agreement it is ordered that the allegations of said amendment shall be considered as denied by the denials of plaintiff's reply hereinbefore filed.

April Term, July 9, 1893.

This cause coming on for hearing on the pleadings, evidence and exhibits, was argued by counsel and submitted to the court. And the court, upon consideration, finds that each and every of the said parties defendant have been served with process herein, or otherwise duly notified, according to law, of the pendency and prayer of the petition of the plaintiff herein, or have filed their answers herein.

And the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, with a view of excepting to the decision of the court upon the questions of law involved in the trial, requested the court to state in writing the conclusions of fact found separately from the conclusions of law.

And the court, being fully advised in the premises, finds the following conclusions of fact:

I. On the 1st day of November, A. D., 1864, the Columbus & Indianapolis Central Railway Company was a corporation duly organized under the laws of the States of Ohio and Indiana, having its principal office and place of business in said State of Ohio,
38 and on said day the said railway company prepared, signed and sealed its certain series of bonds, of that date, numbered consecutively from one to one thousand inclusive, for one thousand dollars each, including the thirty-six (36) bonds described in the petition herein, payable to William D. Thompson or bearer on the 1st day of November, in the year 1904, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the 1st days of May and November of each year; each of said bonds having thereto annexed coupons payable to bearer, semi-annually

in the city of New York, on the 1st day of May and November of each year for the semi-annual installments of said interest. The said bonds and coupons were in the words and figures as set forth in the petition.

II. At the time of the signing and sealing of said bonds, the said Columbus & Indianapolis Central Railway Company owned and was operating a railroad extending from the city of Columbus, Franklin county, Ohio, to the city of Indianapolis, in Marion county, Indiana (including a branch from Covington to Union in said State of Ohio), with its franchises, equipment and property as described in the petition, subject to a first mortgage theretofore made by said company.

III. At the time of the signing and sealing of the bonds hereinbefore described, the said Columbus & Indianapolis Central Railway Company executed and delivered its certain mortgage or deed of trust of that date to the defendant, Archibald Parkhurst, as trustee, in the words and figures following, viz:

This indenture, made on the 1st day of November, in the year one thousand eight hundred and sixty-four, between the Columbus & Indianapolis Central Railway Company, a corporation of
39 the States of Ohio and Indiana, of the first part, and Archibald Parkhurst, of the city of New York, trustee, upon certain trusts hereinafter provided, party of the second part, witnesseth:

Whereas, the Columbus & Indianapolis Railroad Company, a corporation of the State of Ohio, lately of that name, whose road extended from Columbus to Covington and thence to Union, purchased the railroad of the Richmond & Covington Railroad Company, a railroad extending from said Covington to the State line between the States of Ohio and Indiana, and which said last-mentioned road with its appurtenances and appendages, for the consideration in the agreement of sale mentioned, was duly conveyed to said Columbus & Indianapolis Railroad Company, whereby the railroad of the last-named company formed a continuous line of railroad without break and of the same gauge from Columbus to said State line and there connected by continuous line of the same gauge with the railroad of the Indiana Central Railway Company from said State line to the city of Indianapolis in the State of Indiana.

And whereas afterward, the said Columbus & Indianapolis Railroad Company and the Indiana Central Railway Company in the lawful exercise of their corporate powers under their charters, and the laws of the States of Ohio and Indiana consolidated themselves together and became one single corporation under the name of the Columbus & Indianapolis Central Railway Company, the party hereto of the first part, whereby the said party of the first part became liable for and assumed all the just debts and liabilities existing against either of said companies thus consolidated and composing the first party.

And whereas, the Columbus & Indianapolis Railroad Com-
40 pany heretofore became indebted by the issue of bonds secured by a second mortgage on their said railroad and its appurtenances, etc., amounting to four hundred thousand dollars, and

also became indebted by the issue of other bonds secured by their mortgage on their said railroad amounting to four hundred thousand dollars.

And whereas, the party of the first part deem it expedient to create a fund of two hundred thousand dollars (in addition to three hundred and four thousand dollars heretofore provided) to pay for an additional equipment and machinery that may be required by the party of the first part all of which said mortgage bonds and additional fund for equipment and machinery amounts in the aggregate to one million of dollars.

And whereas, at a meeting of the board of directors of the Columbus & Indianapolis Central Railroad Company held at Columbus on the thirteenth day of October, A. D. 1864, the said board determined that it was expedient for said corporation to reduce to a single form and class as well as the said bonded indebtedness of the Columbus & Indianapolis Central Railway Company growing out of said second and third mortgage bonds of the Columbus & Indianapolis Railroad Company amounting to eight hundred thousand dollars and also the said fund of two hundred thousand dollars for additional equipment and machinery, making in the aggregate one million of dollars, and it was thereupon resolved by said board:

First. That a new series of one thousand bonds of this company be prepared for issue and delivery signed by the president and secretary and authenticated when issued by the certificate of a trustee each for the sum of one thousand dollars, to be numbered consecutively from one to one thousand, bearing date the first
41 day of November, A. D. 1864, and payable to W. D. Thompson, or bearer, in the city of New York, on the first day of November, A. D. 1904, with interest warrants thereto attached, signed by the secretary, for the payment of interest thereon at the rate of seven per centum per annum, payable at the same place, half yearly on the successive first days of May and November of each year.

Second. That a deed of conveyance be prepared and executed, to be signed by the president and secretary, conveying the road and its appurtenances and appendages, its franchises, equipments, property, tolls, income and interest, to a trustee, to secure the payment of said bonds and interest warrants and in such form and with such provisions as the president of this company by executing the same shall approve subject to a prior lien of three millions two hundred thousand dollars.

Third. That unless the board of directors otherwise direct, the said bonds shall be used for no purpose except to be negotiated, substituted or exchanged for the present outstanding bonds hereinabove mentioned of eight hundred thousand dollars and for said additional equipment and machinery to the amount of two hundred thousand dollars and so that by the surrender and payment of said outstanding bonds, the whole second and third mortgage bonded indebtedness of this company may be included and expressed in and by the bonds prepared under this resolution.

Fourth. That a sinking fund of five thousand dollars annually to provide for the payment of said bonds shall be formed by setting apart on the first day of November, A. D. 1865, and each and every year thereafter on the first day of November the sum of five thousand dollars. This sinking fund shall be kept and invested by three commissioners, one of whom shall be president of this
42 company, the other two shall be members of this board, one of which shall be changed annually. They shall invest the said fund in the outstanding second mortgage bonds of this company if the same can be obtained at a price not exceeding ten per cent. premium, otherwise at the discretion of the commissioners in stocks of the United States or the States of Ohio and Indiana.

Fifth. The commissioners shall frame rules for the safety and management of the said trust and file the same with the treasurer; and shall annually file their report with the treasurer, showing the condition, amount and investment of said sinking fund.

And, whereas, the said Columbus & Indianapolis Central Railway Company hath made and executed one thousand bonds of the numbers, form, denomination and character prescribed by said resolution and holds the same to be authenticated, used and disposed of in accordance with the provisions and requisitions of said resolution.

Now, therefore, in further pursuance of said resolution and to the end and purpose of assuring the punctual payment of the said one thousand bonds and each of them to each and every person who may become the holder of the same or any of them.

This indenture witnesseth, that the said Columbus & Indianapolis Central Railway Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar paid to said company by Archibald Parkhurst of the second part, at and before the ensealing of these presents, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign and convey unto the said Parkhurst, his heirs, executors, and administrators, all and singular, the
43 entire railroad of the first party, extending from Columbus to Indianapolis, including the branch from Covington to Union, and its franchises, equipments, property, tolls and interest; that is to say, the lands, tenements, hereditaments, fixtures, goods and chattels of said company, its property rights, privileges, interest and estate of every description and nature, its rails, ties, fences, buildings and erections, its rights of way, cars, engines, tools and machinery, its rents, reservations and reversions of every nature, including all the property which said first party now possesses or may hereafter acquire, with the benefit of all contracts which said first party hath made or by assignment or succession hold or may hereafter make or have, either in law or equity, and the right to all tolls, incomes, issues, profits and interests which may hereafter accrue to said first party from any source whatever; provided, however, that the grant and conveyance aforesaid shall not include nor operate to transfer nor be held to prohibit the first party from selling and conveying any land which said company own that is not

and cannot be used for any purpose incident to the management and business of said railroad company or the repairs of the road, nor be held to prohibit said first party from applying any money or personal property belonging to said company, to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of the necessary machinery or the rental thereof; and the board of directors may likewise lawfully distribute such net annual income or profits to stockholders after paying the interest of said bonds and providing for said sinking fund as shall accrue beyond said interest and sinking fund.

And provided further, that this conveyance is made subject to the prior rights, property, estate and liens created by a certain mortgage or trust deed hereinafter mentioned.

44 To have and to hold the premises, interest and rights which pass or are intended to pass by this conveyance unto the said Parkhurst, his heirs, assigns, executors and administrators forever.

In trust nevertheless for the persons and corporations and for the benefit, protection and security of the persons or corporations who shall hold the bonds about to be issued by the party of the first part and for enforcing the stipulations of said company in this behalf in their true intent and meaning, whether contained in said bonds or interest warrants, or in this deed and for the better assuring and confirming the title and power of the said Parkhurst, his heirs and assigns, executors and administrators and especially in relation to such property, interest and rights hereafter ac-ruing to or acquired by said company and intended to pass by this conveyance. The said party of the first part hereby covenants with the said party of the second part, his heirs, assigns, executors and administrators, that at any time hereafter and as often as may be required by the person or persons holding the above-granted estate in trust, the said company will do such acts and make such further assurances in law as such trustee or trustees shall by counsel learned in the law be reasonably advised are necessary for or tend to the better carrying out of the object of the parties to this mortgage or deed of trust. In case default be made by said company in payment of any money either principal or interest secured by this mortgage, the said party of the first part here covenants and agrees with the said grantee, that within six months after such default shall have been made (the same default still continuing) the said company on the demand of the trustee or trustees for the time being shall surrender to him or them or to their agent the actual possession of the herein

45 granted and demised premises together with the record books, papers and accounts of said company; the expense of taking and holding and managing said property if possession be taken to be paid from the income, and if necessary, from the sale of such personal property as the trustee or trustees may deem proper, and the said party of the first part doth herewith and hereby give its warrants of attorney irrevocably by which in case of default by said company to make payment of any sum of money, either principal or interest secured by this mortgage for the period

of six months after the same shall have become due and payable, the said company doth authorize any lawful attorney-at-law or solicitor in chancery of the States of Ohio or Indiana, to enter the appearance of said company without process in any court or courts of competent jurisdiction, to any bill or bills filed by the trustee or trustees for the time being for the foreclosure and sale of the premises by this deed granted and conveyed or a part thereof; and if requested by said trustee or trustees to consent on behalf of said company, that a receiver or receivers be appointed forthwith by order of said court or courts, to take possession of said road or any part thereof, and of all or any of the property, real or personal hereby conveyed, and of all or any of the effects, books, business or papers of said company upon such terms, etc., as said court or courts shall prescribe, and further to consent that a decree or decrees forthwith pass for the sale of the whole or any part of the premises hereby granted and conveyed, without appraisement, but under the direction of the court, and to enter on behalf of said company a stipulation not to appeal from said decree and not to impede the execution thereof by an application for a rehearing or by bill of revivor or by other step to produce delay.

46 Provided however, that said trustees shall not demand the surrender of possession of said property, or file a bill for the foreclosure and sale of said premises unless the same is requested in writing by holders of at least three hundred of said bonds. And it is further agreed by the party of the first part that in case the said company for the term of six months shall make default of the payment of its interest warrants or any of them, then the whole principal money contained in the said bonds shall become due and payable. And it is further agreed by the party of the first part that the proceeds of the sale hereinbefore mentioned, shall be applied, first, to paying said trustee all reasonable charges and expenses and to indemnifying him from all liability as trustee. Secondly, to paying the holders of said bonds in full or in equal proportions the principal and interest of said bonds, and lastly, to pay the surplus, if any, to the members of said company, who hold stock at the time of the sale.

It is hereby mutually agreed by the parties that the said trustee shall be responsible for gross negligence and willful default only nor shall said trustee be bound to take any steps unless at his option touching the execution of this trust, which in his opinion is likely to involve him in expense or personal liability, unless some one or more of the bondholders as often as the trustee shall deem necessary, shall give to said trustee reasonable security to indemnify him against such expense and personal responsibility anything hereinbefore contained to the contrary notwithstanding. In all cases in which the trustee may be required to act he is hereby invested with full power of arbitrament and of compromise and of appointing agents and attorneys to act in his behalf.

Upon the decease or inability to act of the said Archibald
47 Parkhurst, or of any other trustee hereafter appointed by a court of equity as successor, any court of competent jurisdic-

tion is hereby authorized to appoint a trustee in the place of such deceased trustee on application by the holders of one-sixth of the number of said bonds and by decree or otherwise invest the person so appointed with the full estate, powers, rights, interests and obligations of the present trustee and subject to the provisions and stipulations of this indenture. And it is hereby declared that all the estate, trusts, powers, provisions, stipulations and conditions, of this indenture shall attach to and be executed by whomsoever shall be appointed trustee as aforesaid in the same manner as by and to the said original trustee.

Provided, however, nevertheless and these presents are upon the following express conditions, that if the said party of the first part shall well and truly pay to the holders of the said bonds the several and respective sums of money and interest due and accruing on the day and according to the conditions therein expressed, then and thenceforth this indenture and the estate hereby granted shall become void.

It is hereby made known and declared that this conveyance and the trusts and provisions therein contained are subordinate, and subject to a prior lien created by a certain mortgage or trust deed heretofore executed by the first to the second party and dated on the 13th day of October, A. D. 1864, to secure the payment of thirty-two hundred bonds of one thousand dollars each, with interest from January 1st, 1865, at the rate of seven per cent. per annum, payable semi-annually, and which bonds are due on the 1st day of November, in the year one thousand nine hundred and four, and further secured by the reservation annually of a sinking fund of sixteen thousand dollars.

48 In witness whereof, the said party of the first part to these presents in duplicate hath set its corporate seal, and the president and secretary duly authorized by resolution of said company hath for and in behalf of said company subscribed the same.

COLUMBUS & INDIANAPOLIS CENTRAL RAILWAY,

[CORPORATE SEAL.] By B. E. SMITH, *President.*

Attest: G. MOODIE, *Secretary.*

Signed, sealed and acknowledged in presence of us—

WM. FERSON.

WM. JAMISON.

STATE OF OHIO, }
Franklin County, } ss:

Be it remembered, that on the fourth day of November, A. D. 1864, at said county of Franklin, before me, the undersigned, a notary public in and for said county and State, personally appeared on behalf of the Columbus and Indianapolis Central Railway Company, the within-named Benjamin E. Smith, the president, and Gordon Moodie, secretary of said company, and the signers of the

within deed, and acknowledged the ensealing of said deed with the corporate seal of said company, and the execution thereof by them in behalf of said company, to be the voluntary act and deed of said company and their voluntary act and deed as such president and secretary.

In witness whereof I have hereunto affixed my notarial seal and official signature the day and year first above written.

[SEAL.] WM. JAMISON,
Notary as Aforesaid.

Entered for record November 11 at 8 a. m., and recorded November 12, 1864. Recorder's fee, $5; postage, 20 cents.

H. M. LUKENS, *R. M. C.*

$5.20 paid by F. Chance.

Said Parkhurst having duly accepted said trust, the said mortgage or deed of trust was during the month succeeding the execution of the same duly recorded in the office of the county recorder of each of the counties in the States of Ohio and Indiana through or into which the said railroad was constructed.

V. Shortly after the signing and sealing of said one thousand bonds they were all duly certified by the said Archibald Parkhurst, trustee, in the form as appears in the copy of said bond set forth in the petition.

VI. Prior to January 1, 1867, seven hundred and ninety of said one thousand bonds had been duly issued in exchange for a like number and amount of the said second and third mortgage bonds of the said Columbus & Indianapolis Railroad Company as provided in said mortgage, and thirty-one of said bonds had been duly issued and sold by said railway company. The highest serial number of the eight hundred and twenty-one bonds so issued and exchanged or sold was No. 833. The remaining one hundred and seventy-nine of said one thousand bonds, including all the thirty-six bonds described in the petition, having been delivered prior to 1870 by A. Parkhurst, the trustee to Benj. E. Smith, as president of the company, remained in his possession as president of said company and the companies into which the same was successively consolidated as hereinafter set forth, unissued until the months of November and December, A. D. 1875, and the happening of the events in those months hereinafter set forth. To which finding the plaintiff excepted.

VII. On or about the 11th day of September, 1867, the Columbus & Indianapolis Central Railway Company was consolidated with the Union & Logansport Railroad Company and the Toledo, Logansport & Burlington Railroad Company under the laws of the States of Ohio and Indiana, and became the Columbus & Indiana Central Railway Company.

VIII. On or about the 12th day of February, A. D. 1868, the said Columbus & Indiana Central Railway Company and the Chicago & Great Eastern Railroad Company were consolidated under the laws of Ohio, Indiana and Illinois into and under the

name of The Columbus, Chicago & Indiana Central Railway Company, one of the defendants in this action.

IX. On or about the 20th day of February, A. D. 1868, the said Columbus, Chicago & Indiana Central Railway Company made and executed its fifteen thousand bonds of that date, each for the sum of one thousand dollars, bearing interest at the rate of seven per cent. per annum, payable semi-annually and due upon the first day of April, A. D. 1908, and in order to secure the payment of said bonds, executed and delivered its mortgage or deed of trust of that date to James A. Roosevelt and William R. Fosdick, trustees, and thereby conveyed to them all its property, including all that which had formerly belonged to the Columbus & Indianapolis Central Railway Company, described in the petition.

X. Immediately thereafter the said mortgage was duly recorded in the office of the county recorder of the several counties in the States of Ohio, Indiana and Illinois, into or through which the said railroad ran or was situated.

XI. Afterwards and before the beginning of the foreclosure suit hereinafter mentioned the said Columbus, Chicago & Indiana Central Railway Company issued and sold of said fifteen thousand bonds so secured, bonds to the amount of ten million four hundred and twenty-eight thousand dollars or more.

51 XII. On or about the 15th day of December, A. D. 1868, the said Columbus, Chicago & Indiana Central Railway Company made and executed its five thousand bonds each for the sum of one thousand dollars, of that date and due upon the 1st day of February, A. D. 1909, with interest at seven per cent. per annum, payable semi-annually and for the purpose of securing the payment of said bonds and interest, executed and delivered its second mortgage or deed of trust to Frederick R. Fowler and Joseph T. Thomas, trustees, and thereby conveyed to them all its said property including the property described in the petition. Immediately thereafter the said mortgage was duly recorded in the office of the county recorder in the several counties in the States of Ohio, Indiana and Illinois, through or into which the said railroad ran and was situated.

XIII. It was set forth in said mortgage or deed of trust that the said mortgagor, in addition to fifteen million dollars of first-mortgage bonds was then indebted for outstanding bonds as follows, to wit:

Second-mortgage bonds of the Columbus & Indianapolis Central Railway Company.....	$821,000 00
Income bonds of the Columbus & Indiana Central Railway Company....	1,243,000 00
Chicago & Great Eastern Railway Company construction and equipment bonds....	400,000 00
Total.....	$2,464,000 00

and was further indebted in other liabilities in the estimated sum of two million and five hundred thousand dollars, and it was pro-

vided in said mortgage that of said issue of five million dollars of bonds, the sum of two million five hundred thousand dollars,
52 being bonds numbered 2501 to 5000 inclusive, should be set aside and appropriated and used only in exchange for and to satisfy the two million four hundred and sixty-four thousand dollars of bonds hereinbefore mentioned and recited.

XIV. The eight hundred and twenty-one second-mortgage bonds of the Columbus & Indianapolis Central Railway Company set forth in said mortgage as above set forth were the eight hundred and twenty-one bonds secured by the said mortgage to Archibald Parkhurst, trustee, issued and sold or exchanged by the said Columbus & Indianapolis Central Railway Company hereinbefore described.

XV. On or about the 22nd day of January, A. D. 1869, the said Columbus, Chicago & Indiana Central Railway Company, in consideration of certain rentals to be paid by the lessee by its indenture of lease of that date demised and leased to the Pittsburgh, Cincinnati & St. Louis Railway Company, its entire railroad and property including the railroad and property described in the petition, for the term of ninety-nine years from the 1st day of February, A. D. 1869, renewable forever. And on or about the 1st day of February, A. D. 1869, possession of all said railroad and property was delivered by said lessor to the said Pittsburgh, Cincinnati & St. Louis Railway Company, which company continued to hold possession thereof and to operate the same as such lessee till after the sale of said railroad and property hereinafter set forth.

XVI. It was provided in said lease, that out of the gross annual earnings of said railroad and property, the lessee should first pay all taxes and assessments that should be imposed upon the said property; and that of the surplus of said gross earnings, the said lessee should be entitled to receive seventy per centum for
53 its own use, that the remainder of said gross earnings should be applied—first, to the payment of the interest that should accrue after February 1, 1869, upon the $20,000,000 of bonds of the said lessor, being the bonds secured by the two mortgages to Roosevelt and Fosdick and to Fowler and Thomas, hereinbefore described. Second, to the payment of the interest upon certain income bonds thereafter to be issued by said lessor and which were provided for in the said lease. Third, the balance, if any remaining, to be paid to the said lessor to be distributed as dividends upon its stock or otherwise as said lessor should determine.

XVII. It was further provided in said lease that the lessee should provide the means for and should acquire any needful right of way and real estate, erect such necessary depot, buildings, shops, engine-houses, side tracks and appurtenances and for other permanent construction as might be required to accommodate the traffic upon said railroad and should be entitled to receive for advances so made, income bonds of the said lessor company at par bearing seven per cent. interest payable at such times as should be agreed upon, such bonds to be convertible into stock at the option of the holder at any time. The aggregate of such expenditure not to exceed in the three years following the taking effect of said lease, the sum of

$2,000,000. Expenditures of like character thereafter and the means required therefor were to be matters of mutual agreement from time to time.

XVIII. It was further provided in said lease that no issue of bonds beyond the fifteen millions of first-mortgage consolidated bonds, being the bonds secured by said mortgage to Roosevelt and Fosdick and the five millions of second-mortgage consolidated bonds, being the bonds secured by said mortgage to Fowler
54 and Thomas, and the said two millions of income bonds should be issued by the said lessor company without the consent of the board of directors of the respective parties to the said lease.

XIX. Thereafter no authority or consent was ever given by the board of directors of the said Columbus, Chicago & Indiana Central Railway Company to the issue or sale of the said one hundred and seventy-nine bonds or any of them. To which finding plaintiff excepted.

XX. On or about the 29th day of May, A. D., 1873, the said lease was duly recorded in the Record of Leases in the office of the county recorder of the said county of Franklin and the other counties in the States of Ohio, Indiana and Illinois, into or through which the said railroad ran and was situated.

XXI. On the first and second days of February, A. D. 1875, the said James A. Roosevelt and William R. Fosdick, trustees under the mortgage to them hereinbefore described, commenced their actions for the foreclosure of said mortgage and for other purposes, but not affecting the Parkhurst mortgage aforesaid or the bonds thereby secured concurrently in the circuit courts of the United States for the southern district of Ohio, the district of Indiana and the northern district of Illinois.

XXII. In said actions, one William L. Scott appeared and filed his cross-bill in October, 1881, claiming to be the owner of certain bonds secured by the said mortgage to said Roosevelt and Fosdick, and praying among other things for the foreclosure of the same mortgage, but asking no relief against said Parkhurst mortgage or the bonds secured thereby. Prior to the beginning of said foreclosure suit the said Joseph T. Thomas resigned his said trust under the said mortgage to Frederick R. Fowler and the said Joseph T.
55 Thomas and thereafter the said trust was administered by the said Frederick R. Fowler alone. In said actions the said Columbus, Chicago & Indiana Central Railway Company, Frederick R. Fowler, and others were made parties defendant, and were duly served with process or entered their appearance therein.

XXIII. In said bills of foreclosure the said complainants among other things prayed for the appointment of a receiver or receivers of all said railroad, equipment and appurtenances and other mortgaged premises and of the earnings and income, rents, issues and profits thereof and that the net amount of said earnings should be first applied to the payment of the interest on all the bonds issued under the said mortgage to the complainants and to the payment of the interest on all mortgage bonds having prior liens on said

property in such order as the court might direct and that the balance should be applied to the payment of the sums due and in arrears to and for the sinking fund provided for in said mortgage to them for the redemption of the bonds issued under said mortgage. Such proceedings were had in the said actions in pursuance of the prayer of the said complainants that on the 2d and 3d days of February, 1875, in said courts, the said James A. Roosevelt and William R. Fosdick were duly appointed receivers of the said railroad, equipment and appurtenances and other mortgaged premises embraced in and covered by said mortgage and of the earnings, income, rents, issues and profits thereof and said receivers were directed not to disturb the possession of said mortgaged premises by the said Pittsburgh, Cincinnati & St. Louis Railway Company under the lease to it, but should collect and receive the rental payable by said lessee and should apply the same as provided by the further orders
56 of the court. And it was in said order of appointment further ordered that the Columbus, Chicago & Indiana Central Railway Company by its proper officers in that behalf forthwith transfer and convey to said receivers, the said railroad equipment and appurtenances and other mortgaged premises embraced in and covered by said mortgage and such income, rents, issues and profits thereof.

XXIV. In pursuance of and in obedience to the said orders of court, on or about the 25th day of May, the said Columbus, Chicago & Indiana Central Railway Company duly executed and delivered to the said James A. Roosevelt and William R. Fosdick its deed and thereby conveyed to them as such receivers the said railroad equipment and appurtenances and other mortgaged premises embraced in and covered by said mortgage to them, and the income, rents, issues and profits thereof.

XXV. The said deed was not recorded and the plaintiff, Charles R. Lynde, had no actual knowledge of the existence thereof until the commencement of this action in the year 1891.

XXVI. Immediately after their said appointment the said receivers in pursuance of said order took possession and control of all said railroad and property, its income, rents, issues and profits subject to the physical possession and operation of the said railroad by said lessee, and said receivers continued in the possession and control of the same until after the sale of the said railroad and property hereinafter set forth.

XXVII. Such further proceedings were had in said foreclosure suits that on the 15th, 16th and 23d days of November, 1882, in the said circuit courts similar decrees were entered wherein it
57 was found that said Columbus, Chicago & Indiana Central Railway Company had made default in the payment of the interest on the bonds secured by said mortgage to the said Roosevelt and Fosdick, that said railway company had failed to comply with the agreements in said mortgage in respect to said sinking fund and that said railway company was insolvent and it was therein ordered and adjudged that in case the said railway company failed for ten days to pay the sum found due in said decree, the said

mortgage to the said Roosevelt and Fosdick should be foreclosed and the property conveyed by said mortgage, including all the property described in the petition herein, should be sold for the payment of the principal and interest of said bonds.

XXVIII. In said decree it was further ordered and adjudged, that the said property should be sold subject to the outstanding sectional bonds prior in lien to the mortgage to said Roosevelt and Fosdick, and to all other if any paramount liens thereon, but free from the lien of said mortgage to the said Roosevelt and Fosdick, and that nothing in said decree contained should in any manner effect, prejudice or preclude the holders of said paramount liens or any of them, but that said decree should be without prejudice to the right of them and each of them, and in said decree it was further ordered and adjudged, that the purchaser of said mortgaged premises should, in respect of said premises be invested with, and should hold, possess and enjoy the same and all the rights, privileges and franchises appertaining as fully and completely as the said Columbus, Chicago & Indiana Central Railway Company at the commencement of said suit by said Roosevelt and Fosdick held or now holds and enjoys, or is entitled to hold or enjoy the same, but free from the liens then represented by any party to said cause.

58 XXIX. In said decree it was further ordered and adjudged, that the sale therein decreed to be made and the conveyance, after confirmation thereof, to be executed and delivered in pursuance of said decree, should be valid and effectual forever, and that thereby the defendants in said suits, respectively, and all persons claiming or to claim under them or any of them, subsequent to the beginning of said suits, by the said Roosevelt and Fosdick as purchasers, incumbrancers or otherwise, howsoever, should be, and that they thereby were forever barred and foreclosed of and from all right, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold and every or any part thereof.

XXX. On or about the 10th day of January, 1883, the said Columbus, Chicago & Indiana Central Railway Company having failed to pay the said sum as ordered by the said courts, and in pursuance of said decree and in accordance therewith, and upon an order of sale theretofore, issued for that purpose from said courts, the said property and every part thereof was sold by William P. Fishback, master in chancery of the circuit court for the district of Indiana and Jacob D. Cox, special master commissioner theretofore appointed to execute the said order of sale conjointly with said Fishback by the decree of the circuit court for the southern district of Ohio, unto William L. Scott, Charles J. Osborn and John S. Kennedy for the sum of thirteen million five hundred thousand dollars, which sum was insufficient to pay the outstanding bonds and the interest then accrued thereon, secured by the said mortgage to the said Roosevelt and Fosdick.

XXXI. Afterwards, and on or about the 30th day of Janu-
59 ary, 1883, the circuit courts for the northern district of Illinois, and the district of Indiana, and on the 31st day of

January, 1883, the circuit court for the southern district of Ohio, the said purchase-money having been paid, by orders entered in said causes, duly confirmed and approved said sale and ordered the said Fishback, master in chancery, and said Cox, as special master commissioner in chancery to convey to the said purchasers in fee-simple, all and singular said premises and property, rights and franchises in accordance with the former decrees of said courts.

XXXII. Afterwards, and on or about the 21st day of February, 1883, the said Fishback, as master in chancery, and said Cox, as special master commissioner, in pursuance of said orders and decrees, executed and delivered their deed of that date, and thereby conveyed to the said purchasers, William L. Scott, Charles J. Osborn and John S. Kennedy, in fee-simple, all of said premises and property, rights and franchises, as fully and completely as they might lawfully do under their said authority, and free, clear and discharged of all rights, estate and interest, claim, lien and equity of redemption in or to the premises and property rights and franchises so sold and conveyed, and every or any part thereof of each and every of the defendants to said suits, and of all persons claiming or to claim under them or any of them subsequent to the filing of said bills of foreclosure by said Roosevelt and Fosdick.

XXXIII. Afterwards, on or about the 17th day of March, A. D., 1883, the said Scott, Kennedy and Osborn, with their wives respectively, executed and delivered their deed of that date and thereby conveyed all of said premises and property, rights and franchises for a good and valuable consideration then paid, to the Chicago, St. Louis & Pittsburgh Railroad Company, a corporation of the States of Illinois and Indiana, duly authorized to purchase and own the same.

XXXIV. On or about the 10th day of June, 1890, the said Chicago, St. Louis & Pittsburgh Railroad Company was duly consolidated with the Pittsburgh, Cincinnati & St. Louis Railway Company, together with other railway companies under the name of and thereby became The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, defendant in this action.

XXXV. The defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, is now and through its said predecessors in title has been ever since the said conveyance to Scott, Kennedy and Osborn in the actual, peaceable and undisputed possession of all said railroad, premises and property, rights and franchises, including that described in the petition.

XXXVI. On and before the first day of November, A. D., 1864, one Benjamin E. Smith was the president of the said Columbus & Indianapolis Central Railway Company and continued to be the president of said railway company and its successors into which it was successively consolidated until the sale of the said railroad hereinbefore mentioned in 1883.

XXXVII. In the months of November and December, A. D., 1875, the said Benjamin E. Smith borrowed for his own purposes certain sums of money amounting to $48,000 from W. H. Newbold,

Son & Co., a firm of brokers in the city of Philadelphia, for which he executed and delivered to them his individual notes, and at the same time having as president of the said Columbus, Chicago & Indiana Central Railway Company, the custody and possession of the one hundred and seventy-nine bonds hereinbefore de-
61 scribed, he then, without the knowledge, authority or consent of the said Columbus, Chicago & Indiana Central Railway Company, but falsely pretending to the said W. H. Newbold, Son and Co. that he was individually the owner of said bonds, delivered certain of said bonds, including the thirty-six bonds described in the plaintiff's petition, to the said W. H. Newbold, Son & Co. as collateral security for the payment of his said notes. To which finding the plaintiff excepted.

XXXVIII. Thereafter the said Smith renewed his said notes with the same collateral from time to time until about the 14th day of January, 1878, when the bonds so held as collateral security were sold by the said W. H. Newbold, Son & Co. and the proceeds applied to the payment of said notes and the balance paid over to the said Smith or for his use, and no part of the same was used for the benefit of said railway company. To which finding plaintiff excepted.

XXXIX. At the time the said bonds were so pledged to the said W. H. Newbold, Son & Co., all the past-due coupons had been cut off and while they were so held as collateral security the subsequent coupons as they came due were cut off from the said bonds and delivered to the said Smith, but the same were never presented for payment. To which finding plaintiff excepted.

XL. At the sale of said bonds the said W. H. Newbold, Son & Co. themselves became the purchasers of all said thirty-six (36) bonds, paying the full market price at the time of the purchase, and buying them in good faith without knowledge of any defect in them or any of them; and thereafter they sent the said thirty-six bonds to New York for sale. Plaintiff in the months of May, July and Au-
gust, 1878, purchased said thirty-six bonds in good faith in
62 the usual course of business for valuable consideration, being about ninety cents on the dollar, which was at the time the usual market price for the bonds secured by said second mortgage, and without knowledge or notice of any of the unauthorized or fraudulent acts of said Smith concerning said bonds, and without any knowledge or notice that said bonds had not been sold by the said Columbus & Indianapolis Railway Company and thereby became and is now the *bona fide* holder and owner of said thirty-six bonds and the coupons thereto belonging, described in the petition; and that before said thirty-six bonds had been purchased by plaintiff, the railway company had not made default in the payment of interest on said thirty-six bonds, and no holder of said bonds prior to said plaintiff had elected that the principal sum thereof should become due.

XLI. At the time when plaintiff purchased the said thirty-six bonds, the coupons belonging thereto due May 1, 1878, were still attached to the said bonds and were unpaid.

XLII. On or about the 27th day of August, 1878, the plaintiff

presented the said thirty-six bonds for registration to the secretary of the Union Trust Company, New York, which company had been there-fore designated by said Columbus, Chicago & Indiana Central Railway Company, as its registering agent for said bonds in the city of New York, to put the bonds in the name of the party registering them and taking them out of the register and making them to bearer; and the secretary then caused the same to be registered in the name of said Charles R. Lynde. At the time of said registration no inquiry was made by the said secretary as to whether or not the said bonds had been regularly issued by the said Columbus & Indianapolis Central Railway Company. To the last five lines of which finding plaintiff excepted.

63 XLIII. The coupons maturing May 1, 1878, on these thirty-six (36) bonds, which were attached to them when Charles R. Lynde, the plaintiff, purchased them, were paid to the plaintiff by Mr. A. Iselin of the firm of A. Iselin & Co., Wall street, New York, upon presentation by the plaintiff of said coupons to said Iselin & Co. in October, 1878, and the thirty-six (36) coupons that matured November 1, 1878, on said bonds, were paid to plaintiff by said Iselin & Co. upon the presentation by said plaintiff of said coupons to said Iselin & Co. in April, 1879. The said A. Iselin & Co. were acting for the receivers and a bondholder committee; the bondholder committee furnishing the money, for taking up said coupons, and being afterwards reimbursed by said receivers. In October, 1879, the plaintiff presented the coupons which fell due May 1, 1879, on said thirty-six bonds, but Mr. Iselin then declined to pay said coupons which was the first knowledge or notice of any kind that the plaintiff ever had of any discrimination against or difference between his said thirty-six bonds and any other bonds of the same series. And plaintiff has never received payment of any coupon on said thirty-six bonds or any of them since the payment to him as aforesaid of the coupons that matured in November, 1878. At the time the May and November, 1878, coupons were paid as above set forth the said A. Iselin & Co. had no knowledge but that the said thirty-six bonds had been regularly issued and sold by the said Columbus & Indianapolis Central Railway Company. To the last six lines of which finding the plaintiff excepted.

XLIV. From the year 1871 until after the purchase by the plaintiff of the thirty-six bonds described in the petition the plaintiff held and owned other bonds secured by the said mortgage

64 of the Columbus & Indianapolis Central Railway Company to Archibald Parkhurst, trustee, described in the petition, being some of the 821 bonds hereinbefore described. The said Columbus, Chicago & Indiana Central Railway Company made default in the payment of the interest coupons upon said 821 due on the first day of May, 1875, and on the first day of November, 1875, and the said interest coupons were not paid until after June 30, 1876, when the same were paid by or on behalf of the said receivers hereinbefore mentioned, all which facts were known to the plaintiff at the time he purchased the said thirty-six bonds described in the petition. To which finding plaintiff excepted.

XLV. At the time of the demand made by the plaintiff upon the said Archibald Parkhurst, trustee, hereinafter set forth, and at the time of the commencement of this action interest coupons which had theretofore fallen due upon more than seven hundred of said one thousand bonds described in said mortgage had been paid. On or about the 27th day of June, A. D. 1891, at Newark, in the State of New Jersey, the plaintiff made a personal request and demand in writing of the said Archibald Parkhurst as trustee, to commence an action for the foreclosure and sale of said premises in accordance with the provisions of said deed of trust, for and on account of the default made by the said The Columbus & Indianapolis Central Railway Company in the payment of the coupons upon the thirty-six bonds described in the petition; and plaintiff then and there offered to the said trustee sufficient security and indemnity to protect him against all expenses and personal responsibility by him to be made and incurred in the commencement and prosecution of an action for the foreclosure and sale of said premises. The said Archibald Parkhurst as such trustee then and there refused to take any action in the matter as requested by the plaintiff.

65 XLVI. The defendant, The Columbus, Chicago & Indiana Central Railway Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, have neglected and refused to pay each of the coupons due upon each of the bonds described in the petition, being coupons from and including coupon maturing May 1, 1879, to and including coupon maturing May 1, 1892, the last two of which coupons have fallen due since the commencement of this suit.

XLVII. On the 1st day of October, 1890, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company made its certain mortgage whereby it conveyed to the Farmers' Loan and Trust Company of New York, and to W. N. Jackson of Indiana, as trustee, for the purpose of securing an issue of bonds to be made by the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to amount in the total of seventy-five thousand bonds at the par value of $1,000 each to be issued as in said mortgage set out and upon the property described in the answer and cross-petition of the said Farmers' Loan and Trust Company filed in this cause including the line of railroad and other property connected therewith, described in the petition of the plaintiff herein, and that said mortgage was duly recorded as required by law in all of the counties in all of the several States through or into which said line runs, and that now and by virtue of said mortgage there have been issued bonds to the total number of 5,318, of said bonds, being the bonds numbered from 1,501 to 6,818, both inclusive and amounting in the total to $5,318,000, and that said bonds are now outstanding and in full force and that no default has been made in the payment of interest thereon.

And plaintiff then and there excepted to the parts of said findings of fact as follows, being designated by the numbers of
66 the paragraphs of said findings, viz: Paragraphs, Nos. 6, 19,

37, 38, 39, the last five lines of paragraph 42; the last six lines of paragraph 43; paragraph 44.

And plaintiff also excepted to the following paragraphs of the finding of fact as irrelevant and immaterial: Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35.

And, as conclusions of law from the foregoing conclusions of fact, the court finds the equities of the case in favor of the plaintiff; and that the plaintiff is entitled to the relief prayed for in his petition herein.

And that the said thirty-six bonds, described in the petition, and the coupons thereto annexed, are the valid and binding obligations of the Columbus & Indianapolis Central Railway Company and of the Columbus, Chicago & Indiana Central Railway Company.

And that the plaintiff is the owner and holder of the said bonds and coupons, and each of them, as well as the coupons from said thirty-six bonds which accrued and became due from and including the 1st day of May, A. D., 1879, down to and including the 1st day of May, A. D., 1891; and that there is due to the said plaintiff upon the coupons which have heretofore down to the entry of this decree fallen due, computing interest to this, the 9th day of July, A. D., 1892, the sum of forty-seven thousand six hundred and seventy-three and thirty-six one-hundredth- dollars ($47,673.36). And that under and by virtue of the said mortgage or trust deed described in the petition, the plaintiff has a valid and subsisting lien for the security of said bonds and coupons upon the property described in the petition, as of the 1st day of November, A. D., 1864. And is entitled to a decree for the payment of the said sum so found due.

And in the event of the non-payment thereof, that the said
67 property be sold, and the proceeds applied to the payment of said sum, with interest from the date of this decree, and to the payment of the said coupons hereafter accruing, and to the payment of the principal of said bonds.

To each and all of which conclusions of law the said defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company then and there excepted.

And the plaintiff, Charles R. Lynde, having within the time required by law, filed his written motion in this cause to set aside certain of the findings of fact as appears by said motion filed herein, and for a new trial of this cause, the court, upon consideration of said motion, overruled the same; to which the said plaintiff then and there excepted.

And thereupon the plaintiff produced to the court his certain bill of exceptions, and asked that the same be allowed as true, and signed by the court, and ordered to be filed, which was done and ordered accordingly.

And thereupon, this cause coming on further to be heard upon the findings of fact and conclusions of law, the court having found the equities of the case in favor of the plaintiff, it is therefore ordered, adjudged and decreed, that unless the defendant, The Columbus, Chicago & Indiana Central Railway Company, or some person

or corporation for it or in its behalf, shall within thirty (30) days from the date of the entry of this decree, pay or cause to be paid, to the clerk of this court. the costs of this case, taxed at $—, and to the said Charles R. Lynde, the plaintiff herein, the sum of forty-seven thousand six hundred and seventy-three and $\frac{36}{100}$ dollars ($47,673.36), being the amount which the court finds due to said plaintiff upon the coupons which have heretofore fallen due upon the bonds of the plaintiff, described in the petition herein,
68 computing interest on the amount of said coupons to the 9th day of July, 1892, together with interest on said sum from the date of the entry of this decree until such payment be made;

That the said trust deed or mortgage, described in the petition in this cause, dated November 1st, 1864, be foreclosed;

And that all equity of redemption of the said defendant, The Columbus, Chicago & Indiana Central Railway Company, and all claim, interest or rights of all the defendants in this cause hereinbefore named, of, in and to, said mortgaged premises, property, rights and franchises, and every part and parcel thereof embraced or included, or intended to be embraced, in said mortgage, be foreclosed and cut off and forever barred;

And all the property rights and interest conveyed by said deed of trust or mortgage, dated November 1st, 1864, and in said deed and in the petition herein and hereinafter particularly described, shall be sold free, clear and discharged from all claim or interest of the defendants in this cause, or either of them, being the property described as follows: All that certain railway and line of railroad extending from Columbus, in Franklin county, Ohio, to Indianapolis, in Marion county, Indiana, and including the branch from Covington to Union; and its franchises, equipment, property, tolls and interests, that is to say, the lands, tenements, hereditaments, fixtures, goods and chattels of the Columbus & Indianapolis Central Railway Company, and the corporation or corporations, parties to this cause, who have succeeded to or are now in possession of the rights of the said The Columbus & Indianapolis Central Railway Company in said property, its property, rights, privileges, interest and estate of every description and nature, its rails, ties, fences,
69 buildings and erections, its rights of way, cars, engines, tools and machinery, its rents, reservations and reversions of every nature, including all the right and interest which the said The Columbus & Indianapolis Central Railway Company, the Columbus, Chicago & Indiana Central Railway Company, or any of its or their successors, have or possess in said property, together with the benefit of all contracts which said corporations or any of their successors, defendants hereto, have made or by assignment or succession hold.

And in default of the payment of the sum hereinbefore found to be due and directed to be paid, an order of sale shall issue for the sale of said railroad premises and the property rights and interests in the petition herein described, to the special masters hereinafter named and appointed, directing them to expose for sale and sell said mortgaged premises and property at public auction, to the

highest bidder or bidders, at the door of the county court-house of the county of Franklin, State of Ohio, situated at Columbus, in said county and State, on a day and at an hour to be fixed by the special masters herein appointed, in their advertisement of sale, but not later than ninety days after the issuing of an order for sale hereunder; and previous notice of such time and place and the terms of said sale, shall be given by publication by brief general advertisement, referring to this decree and the proceedings in this cause for a more specific description of the mortgaged property herein ordered to be sold, beginning not less than sixty days before the time of said sale, and to be repeated weekly, in one daily newspaper of general circulation in each of the following cities, viz.: the city of Columbus, Franklin county, Ohio, in the city of Indianapolis, Marion county, Indiana; and said special master shall not
70 be required to advertise said sale in any other of the counties save the said counties of Franklin in Ohio, and Marion in Indiana, where the said property is situated or through which said railroad runs.

The said property in these proceedings and hereinabove particularly described, shall be offered and sold as an entirety, appraisement thereof being hereby expressly dispensed with.

The said special masters may, for good cause, shown at the time and place appointed as aforesaid, and thereafter, at the same place, from time to time adjourn or postpone said sale; and may without further notice proceed with said sale on any day to which the same may thus be adjourned.

The said special masters may give such further notice of sale, in addition to the notice above described, as they may think proper.

Said special masters shall not accept any bids for said property from any bidder or bidders for a less sum than four million five hundred thousand dollars ($4,500,000.00) nor from any bidder or bidders who shall not, if requested by said special masters, place in their hands or deposit with them satisfactory pledge that he or they will make good any bid, if accepted by the court, the sum of one hundred thousand dollars ($100,000.)

Of the price for which said property shall be sold, there shall be paid in cash at the time of the sale a sum equal to the amount of the cash deposit hereinbefore required; and also at the same time, or from time to time thereafter, such further portions of the purchase price as the court may direct.

And the court reserves the right to reject any bid, and to take and sell said property upon failure of any purchaser for twenty (20) days to comply with any order of the court requiring payment.

71 The balance of the purchase price not required to be paid in cash, may either be paid in cash, or the purchaser may satisfy and make good said balance of his bid, in whole or in part, by paying over the outstanding bonds secured by said second mortgage of the Columbus & Indianapolis Central Railway Company, and sufficient cash to pay any such outstanding bonds, not so paid over, and the balance of said purchase-money may be paid in the

outstanding bonds secured by said mortgage to W. N. Jackson and the Farmers' Loan and Trust Company, each of said bonds to be accepted for the sum it would be entitled to upon distribution of the proceeds of said sale.

And any bond or bonds or coupons that may be used to make such payments shall be surrendered to the special masters and cancelled, if the whole amount due thereon is applied upon the purchase price; but if less than the whole amount is required, then the amount so applied shall be stamped or written on such bond or bonds, which shall be then returned to the holder.

As soon as any sale shall have been made by the special masters in pursuance to this decree, they shall report the same to this court for confirmation; further certifying to the court compliance by the purchaser or purchasers with the conditions of sale hereinbefore prescribed.

If any bid shall be accepted by the court and the person or persons making the same shall fail to comply with all the conditions of sale and all the orders of the court with respect thereto, the sum deposited by the bidder or bidders shall be forfeited, and shall be applied as the court may direct.

It is further ordered, adjudged and decreed that the fund and proceeds arising from said sale shall be applied as follows:

72 First. To the payment to the clerk of the court of Franklin county, Ohio, of the costs of this suit, including all proper expenses of sale and such compensation as may be awarded by the court to the special masters for making the sale, and to the payment of the charges of the trustees, parties defendant to this cause, and their expense in the execution of their respective trusts, and the performance of their duties as said trustees, if and as the same may be allowed by the court, and such proper allowances as the court may make for solicitors' fees and disbursements and counsel fees on behalf of the respective parties to this cause.

Second. To the payment of the principal and interest of the said bonds of plaintiff of said issue of second-mortgage bonds of the Columbus & Indianapolis Central Railway Company, dated November 1st, 1864, being the thirty-six bonds, for one thousand dollars, and their coupons, hereinbefore described and found to be due, as well as subsequently accruing coupons on said bonds as may become payable on or prior to the date of the distribution of the proceeds herein provided for; and also to the payment of such other of said same series of second-mortgage bonds of the Columbus & Indianapolis Central Railway Company as may be outstanding and unpaid.

Third. To the defendant, The Farmers' Loan and Trust Company, for the benefit of the holders of the said bonds secured by the mortgage set out in its answer and cross-petition herein, or so much thereof as will pay and satisfy the said 5,318 bonds so outstanding as hereinbefore found.

Fourth. The remainder of the proceeds of sale, if any there may be, are to be distributed in accordance with the orders of the court hereinafter to be made.

73 It is further ordered and decreed that Pelatiah W. Huntington of Columbus, and Frank J. Jones of Cincinnati, be and they are hereby appointed special masters to execute this decree; and upon confirmation of the sale hereby directed, to make, execute and deliver to the purchaser or purchasers thereof a deed or deeds of the property sold. And such purchaser or purchasers shall thereupon be invested with and shall hold, possess and enjoy, the said premises and property, and all the right, privileges and franchises appertaining thereto, as fully and completely as the said defendant, The Columbus, Chicago & Indiana Central Railway Company and The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, or either of them, now holds or enjoys, or is entitled to hold and enjoy the same.

And it is further provided, that in case of the sickness, death or absence from said Franklin county, of either one of said special masters, then that the other be and hereby is authorized and empowered to carry out the provisions and directions of this decree.

And further, that said purchaser or purchasers shall have and be entitled to hold said railway and property, and the rights and franchises appertaining thereto, free and discharged from the lien or encumbrance of all the parties to this suit.

To all which conclusions of law, judgment, orders and decree the said defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, then and there excepted.

And the court, upon application of the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, fixes the penalty of the appeal bond to be given herein, in the event of the appeal of this cause, at the sum of five hundred dollars, and

74 afterward and on the same day came the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and gave notice of its intention to appeal this cause to the circuit court.

April Term, July 9th, 1892.

This day came the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and represents to the court, that it has filed a petition in error in the circuit court of said county to reverse the judgment in said cause, and upon its application the amount of the bond for the stay of execution of the judgment in said cause is fixed at $5,000.

1891, July 3. Petition, aff't and prece. filed. Summons issued to sh'ff of Fr. Co. Ohio (for G. Moody, sect. and treas.), the Columbus, Chicago & Indiana Central Railway Company, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Ret. July 13th. Answer August 1st, 1891.

1891, July 3. Affidavit of E. W. Kittridge for publication filed.

1891, July 7. Copies of Ohio State Journal (of July 6th, 1891) containing legal notice addressed and mailed to Archibald Parkhurst, trustee, Newark, New Jersey,. the Union Trust Company, New York city, N. Y., the Farmers' Loan and Trust Company, New York city, N. Y., the Pennsylvania Co., Philadelphia, Pa.,

the Pennsylvania Railroad Company, Philadelphia, Pa. W. N. Jackson, trustee, Indianapolis, Ind., Conrad Baker, trustee, Indianapolis, Ind., Frederick R. Fowler, trustee, Brooklyn, N. Y., Joseph T. Thomas, trustee, Philadelphia, Pa.

75 1891, July 13. Copy of Ohio State Journal (of July 6th, 1891) containing legal notice, addressed and mailed to Archibald Parkhurst, 1003 Broad street, Newark, New Jersey.

1891, July 14. Leave to def't to plead Oct. 1st, 1891. 74–593.

1891, Sept. 9. Answer and cross-pet. of the Farmers' Loan and Trust Co. of New York, filed.

1891, Oct. 14. Leave to def't to file ans. and cross-pet. herein. 78–252.

1891, Oct. 14. Ans. and cross-pet. of the P., C., C. & St. L. R'y Co., filed.

1891, Oct. 16. Reply filed.

1891, Oct. 31. Demurrer of the P., C., C. & St. L. R'y Co., filed.

1891, Oct. 31. Motion of the P., C., C. & St. L. R'y Co., filed.

1891, Nov. 16. Proof of publication filed (Ohio State Journal).

1891, Nov. 16. Depositions on behalf of pl'ff filed.

1891, Dec. 7. Demurrer overruled. Exceptions by def't. Interrogatories to be answered by Dec. 26th, 1891. 79–391.

1892, Jan. 12. Leave to def't to file amendment to answer. 80–232.

1892, Jan. 12. Amendment to answer filed.

1892, Feb. 2. Answer of S. B. Liggett to interrogatories filed.

1892, Feb. 2. Answer of F. H. B. McKnight to interrogatories annexed to pl'ff's reply, filed.

1892, Feb. 29. Depositions on behalf of the P., C., C. & St. L. R'y Co. filed.

1892, March 5. Depositions on behalf of the C., C. & I. C. R'y Co. filed.

76 1892, March 8. Depositions on behalf of def'ts filed.

1892, July 9. Judgment for pl'ff *vs.* def't C., C. & I. C. R'y Co. for $47,673.36. Exceptions. Decree of foreclosure and order of sale. Ex. Bill of exceptions allowed, signed and sealed. Notice of appeal. Bond filed at $500.00. 80–537.

1892, July 9. Motion to set aside certain finding of facts filed.

1892, July 9. Bill of exceptions filed.

1892, July 9. Stay of execution allowed. Bond $500.00. 80–551.

77 STATE OF OHIO, }
County of Franklin. }

Circuit Court.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,

vs.

CHARLES R. LYNDE, THE COLUMBUS, CHICAGO AND INDIANA Central Railway Company, Archibald Parkhurst, Trustee; The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, The Pennsylvania Railroad Company, W. N. Jackson, Trustee; Conrad Baker, Trustee; Frederick R. Fowler and Joseph T. Thomas, Trustees, Defendants in Error.

Petition in Error.

Plaintiff in error says that it is a corporation duly incorporated under the laws of Ohio.

Plaintiff says, that on or about the 3rd day of July, 1891, the defendant, Charles R. Lynde, commenced his action in the court of common pleas of Franklin county, Ohio, against The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, plaintiff herein, and the said Columbus, Chicago & Indiana Central Railway Company, Archibald Parkhurst, trustee; The Union Trust Company of New York, The Farmers' Loan and Trust Company of
78 New York, The Pennsylvania Company, The Pennsylvania Railroad Company, W. N. Jackson, trustee; Conrad Baker, trustee; Frederick R. Fowler and Joseph T. Thomas, trustees.

Such proceedings were had in said cause, that at the April term of said court, 1892, to wit, on or about the 9th day of July, 1892, the said Charles R. Lynde recovered a judgment against the said plaintiff in error herein for the foreclosure of a certain mortgage described in his petition and an order for the sale of certain property described in his said petition. A transcript of the docket and journal entries in said cause together with the original papers and pleadings are herewith filed.

Plaintiff says, that there is error in the said proceedings, orders and judgment in this to wit:

First. The facts set forth in said petition are not sufficient in law to maintain said action against plaintiff in error.

Second. The said court erred in overruling the motion of the plaintiff in error filed in said cause on the 31st day of October, 1891, to strike out certain matters from the reply in said cause.

Third. The court erred in overruling the demurrer of the plaintiff in error to the interrogatories filed with the reply in said cause.

Fourth. The court erred in each and every one of its conclusions of law in said cause.

Fifth. The said judgment was given for the said Charles R. Lynde when it ought to have been given for plaintiff in error.

Sixth. The said judgment is contrary to law.

79 The plaintiff in error therefore prays that the said judgment may be reversed and that it be restored to all things it has lost by reason thereof.

WATSON, BURR & LIVESAY,
Attorneys for Plaintiff in Error.

Cross-petition of Charles R. Lynde, One of the Defendants in Error Above Named.

Now comes Charles R. Lynde, one of the defendants in error above named, and for his cross-petition in error herein, says that at the April (1892) term of the common pleas court of Franklin county, Ohio, by the consideration of said court, certain findings of fact and conclusions of law were made by said common pleas court, and a certain judgment and decree rendered on said findings of fact and conclusions of law at said term of said court, in a certain cause in said court pending, and being cause No. 25301 on the docket of said court; wherein said Charles R. Lynde, cross-petitioner in error herein was the plaintiff, and the plaintiff in error herein, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and the other defendants in error to this cross-petition in error above named were defendants; all of which appears in and by the record and proceedings in said cause in said common pleas court.

And this cross-petitioner in error says that in said record and proceedings there was error, of which this cross-petitioner in error complains, in this, to wit:

First. The said common pleas court erred at the trial in admitting incompetent and immaterial evidence offered by the said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Com-
80 pany, plaintiff in error above named (defendant below), against the objection of this cross-petitioner in error (plaintiff below); to which rulings and to the admission of such evidence this cross-petitioner in error (plaintiff below) at the time excepted.

Second. The said common pleas court erred at the trial in refusing to strike out on the application of this cross-petitioner in error (plaintiff below) incompetent and immaterial evidence offered and read in evidence by the said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in error above named (defendant below); to which rulings and refusal of the court this cross-petitioner in error (plaintiff below) at the time excepted.

Third. The said common pleas court erred at the trial in excluding evidence offered by this cross-petitioner in error (plaintiff below); to which rulings and exclusion by the court this cross-petitioner in error (plaintiff below) at the time excepted.

Fourth. The said common pleas court erred in certain of its findings of fact, such findings and parts of findings of fact being contrary to law, and not sustained by sufficient evidence and against the weight of the evidence; and were excepted to by plaintiff below at the time, said erroneous findings and parts of findings of fact being those numbered, described and specified as follows, to wit:

Paragraphs of the findings of fact numbered 6, 19, 37, 38, 39; the last five lines of paragraph 42, the last six lines of paragraph 43, paragraph 44, and particularly that part and so much of said findings of fact, as finds that *that* said bonds of the plaintiff, described in the pleadings and findings in said cause, were wrongfully and without the knowledge, authority and consent of the said The Columbus, Chicago & Indiana Central Railway Company, or
81 the said The Columbus & Indianapolis Central Railway Company, applied to the individual use of Benjamin E. Smith, or wrongfully issued or appropriated by him. And particularly so much of those parts of said findings of fact as finds that no part of the proceeds received for said bonds were used for the benefit of the said The Columbus, Chicago & Indiana Central Railway Company or of said The Columbus & Indianapolis Central Railway Company together with such other parts of said findings of fact as the record shows were specifically excepted to by the plaintiff below.

To which erroneous findings and parts of findings of fact above set forth, this cross-petitioner in error (plaintiff below) then and there excepted.

Fifth. Said court erred in overruling the motion and application of this cross-petitioner in error (plaintiff below) (filed in writing in said common pleas court, as the record shows) to set aside said erroneous findings and parts of findings of fact, upon the ground set forth in the written application of plaintiff below to set the same aside; to which ruling of the court in overruling and denying said application of this cross-petitioner in error (plaintiff below) to set aside said findings and parts of findings of fact, this cross-petitioner in error (plaintiff below) then and there excepted.

Sixth. The said common pleas court erred in overruling the objections of this cross-petitioner in error (plaintiff below) to said findings and parts of findings of fact above set forth; to which action of the court this cross-petitioner in error (plaintiff below) then and there excepted.

The original papers, pleadings and files in said cause in said common pleas court, together with a certified copy of the transcript of the docket and journal entries in said cause having been filed
82 in this, the circuit court of Franklin county, O., by the plaintiff in error above named, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, with and as part of its original petition in error in this cause, this cross-petitioner in error refers to said transcript, and said original papers, pleadings and files already on file in the above-entitled cause in this court, and makes them part of this cross-petition in error. And, in addition thereto, this cross-petitioner in error files herewith his bill of exceptions heretofore allowed, signed and filed and made part of the record by and in said common pleas court in said cause.

Wherefore this cross-petitioner in error prays that said findings and parts of findings of fact hereinabove enumerated, set forth and referred to may be reversed and set aside and held for naught; and that this cross-petitioner in error may be restored to all things he may have lost by reason of said erroneous findings and parts of

findings of fact. And this cross-petitioner in error further prays that the said conclusions of law and the said judgment and decree rendered and entered by the said common pleas court below in said cause may be affirmed; and for all other and further relief to which this cross-petitioner in error may be entitled.

KITTREDGE & WILBY,
Att'ys for Charles R. Lynde, Cross-petitioner in Error.

83 *Journal Entries to the Supreme Court.*

In the Circuit Court, January Term, March 9, 1893.

This day came the parties and this cause coming on to be heard upon the petition in error of the said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the court of common pleas of Franklin county, Ohio, filed therewith and upon the cross-petition in error of the defendant, Charles R. Lynde, together with the bill of exceptions therewith filed and was argued by counsel upon consideration whereof the court find that there is no error manifest in the said proceedings and record in said court of common pleas. It is therefore considered, ordered and adjudged by this court that the judgment and proceedings of the said court of common pleas be and the same are hereby in all things affirmed, to which finding of the court that there is no error in the record and proceedings in the court below prejudicial to the said plaintiff in error and to the order and judgment of this court affirming the judgment of the said common pleas court, the said plaintiff in error, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company excepts. The defendant in error, Charles R. Lynde, excepts to so much of the foregoing finding of the court, and only so much thereof as finds that there was no error in the said proceedings and record in the court of common pleas in the matters set forth and complained of by the defendant in error, Charles R. Lynde, in his cross-
84 petition in error in said circuit court, and the court do further find that there was reasonable ground for this proceeding in error. And it is further considered and adjudged that the plaintiff in error pay the costs of this proceeding in error taxed at $—, and in default thereof execution issue therefor and it is ordered that a special mandate be sent to the court of common pleas, Franklin county, to carry this judgment into execution; to which judgment and order the plaintiff in error excepts. And upon application of the plaintiff in error it is ordered that the undertaking for the stay of execution in this case be given according to law in the sum of $5,000.

(Duly certified.)

85 Supreme Court of Ohio, January Term, 1893.

THE PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY *vs.* CHARLES R. LYNDE, THE COLUMBUS, CHICAGO AND Indiana Central Railway Company, Archibald Parkhurst, Trustee; The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, The Pennsylvania Railroad Company; W. N. Jackson, Trustee; Conrad Baker, Trustee; Frederick R. Fowler and Joseph T. Thomas, Trustees.	# 3570. Error to the Circuit Court of Franklin County.

Transcript of Docket and Journal Entries.

1893, Ap'l	21	Petition in error and waiver of summons of Chas. R. Lynde filed.
"	"	Appearance of Farmers' Loan and Trust Company filed.
"	"	Affidavit for service by publication filed.
"	"	Circuit court transcript and original papers filed.
"	26	Copies of Ohio State Journal containing notices of publication of commencement of suit of date Ap'l, 1893, sent to Archibald Parkhurst, trustee, Newark, N. J.; the Union Trust Company, New York, N. Y.; the Pennsylvania Company, Pittsburg, Pa.; the Pennsylvania Railroad Company, Philadelphia, Pa.; W. N. Jackson, trustee, Indianapolis, Ind.; Conrad Baker, trustee, Indianapolis, Ind.; Frederick R. Fowler, trustee, Brooklyn, N. Y., & Joseph T. Thomas, trustee, Philadelphia, Pa., by mail, by Josiah B. Allen, clerk.
" May	31	Cross-petition in circuit court taken by Watson, Burr & Livesay.
" June	1	Cross-petition in circuit court returned by Watson, Burr & Livesay.
"	14	Printed record filed.
"	27	Proof of service of printed record filed.
" July	27	Proof of publication filed.
" Sept.	2	Cross-petition in error of Chas. R. Lynde filed.
"	2	Summons on cross-petition in error issued to the sheriff of Franklin Co. for the P., C., C. & St. L. R'y Co. and the C., C. & I. C. R'y Co., returnable Sept. 11th, A. D. 1893.
"	"	Bill of exceptions filed by Jos. Wilby.
"	"	Motion by d'f't C. R. Lynde to dismiss & require printing filed.
"	5	Entry of appearance & waiver of summons of Farmers' Loan & Trust Co. to cross-petition of Chas. R. Lynde filed.
86		
1893, Sept.	9	Summons on cross-petition returned and filed, endorsed: Received this writ on September 2d, 1893, and on September 5th, 1893, I served the within-named The Pittsburg, Cincinnati, Chicago & St. Louis R'y Co. by personally handing to W. W. Medary, the regular freight agent of said company, a true copy thereof, with all the endorsements thereon. I also on the 7th day of September, 1893, served the within-named The Columbus, Chicago & Indiana Central Railway Company by personally handing to Gordon Moody, the secretary and treasurer of said company, a true copy thereof, with all the endorsements thereon. James Ross, sheriff. W. W. Slemmons, deputy. Fees, $1.45.
"	15	Notice of motion by d'f'n't Lynde to dismiss, &c., filed.
		Journal Entry.
" Oct.	10	Motion by defendant to dismiss and to require printing of bill of exceptions in cause No. 3570 on the general docket. "Ordered by the court that said motion be, and the same is hereby, overruled." Order Book No. 13, page 189.
" Oct.	17.	Bill of exceptions sent to E. W. Kittredge.

		Journal Entry.
1893, Oct.	26	"Ordered by the court that the defendant Charles R. Lynde is allowed 60 days in which to file printed record on cross-petition." Order Book 13, page 211.
" Nov.	20	Printed record on cross-petition of Lynde filed.
" "	22	Proof of service of printed record on cross-petition filed.
" "	28	Bill of exceptions returned.
" Dec.	15	Motion by pl'ff for injunction filed.
" "	20	Notice of motion, affidavit, & stipulation filed.
		Journal Entry.
1894, Jan'y	23	Motion by plaintiff for injunction in cause No. 3570 on the general docket. "Ordered by the court that said motion be, and the same is hereby, overruled." Order Book 13, page 297.
" Mar.	14	Bill of exceptions taken by Watson, Burr & Livesay.
" Nov.	14	Suggestion of death of defendant Charles R. Lynde and entry of revivor in the name of the Long Island Loan and Trust Company of Brooklyn, New York, filed.
1895, Mar.	20	Plaintiff's printed briefs filed.
" "	29	Proof of service of pl'ff's printed briefs filed.
1896, "	30	Defendants' printed briefs and proof of service filed.
" Ap'l	2	Proof of service of d'f'ts' printed briefs filed.
" May	26	Plaintiff's printed reply briefs and proof of service filed.
" June	1	Bill of ex. returned by Watson, B. & L.
		Journal Entry.
" "	23	"This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county and was argued by counsel; on consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed, and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—."
87		Ordered that a special mandate be sent to the court of common pleas of Franklin county to carry this judgment into execution. Ordered that a copy of this entry be certified to the clerk of the circuit court of Franklin county "for entry." Order Book No. 15, page 30.
1896, June	27	Mandate issued.

STATE OF OHIO, *City of Columbus,* } *ss:*

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing is a true and full transcript of the docket and journal entries as appear in the minute and order books of this office in cause No. 3570, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company *vs.* Charles R. Lynde *et al.*, error to the circuit court of Franklin county, Ohio, and that the same, with the printed volume hereto affixed, is a true and full transcript of the proceedings and record in said cause.

I further certify that said supreme court of Ohio is the highest court of law and equity in the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this thirtieth day of June, A. D. 1896.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk.*

87½ [Endorsed:] Transcript of docket & journal entries in the supreme court of Ohio. Fees, $2, paid by Watson, Burr & Livesay.

88 THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
CHARLES R. LYNDE *et al.*

1. The bonds of an Ohio railroad corporation, payable in New York city to bearer, are negotiable without endorsement, although sealed with the corporate seal; notwithstanding, that they were made in 1864, while section 1 of the act of 1820 (S. & C. 862), in relation to negotiable paper was in force.
2. Where such bonds are secured by a mortgage on the roadway and other property of the maker, executed to a trustee for that purpose, and are issued at different times, the lien of all the bonds outstanding, in the hands of *bona fide* holders for value, are equal in priority. The lien of each bond dating from the record of the mortgage that secured it and not from the time it was issued.
3. Where such bonds, complete in form, and negotiable by delivery, are placed in the custody of the president of the company, he thereby becomes clothed with an apparent authority of disposition. In such case if the custodian, without the consent or knowledge of the company, wrongfully and for his own benefit, negotiates them, and in due course of business before due, to one who pays therefor their fair value, without notice of any restriction on such apparent power of disposition, the transaction confers upon such purchaser a valid title to the bonds so purchased, and entitles him to a lien against the mortgaged property for their payment.
4. Where such mortgage contains a condition providing that in case the company defaults for more than six months in the payment of interest on such bonds, they shall immediately become due and payable, and such default is made. Query: Whether such default, alone, without any steps being taken by any holder to enforce the provision, is such a dishonor of the bonds as to destroy their negotiability. But whether this default would have such effect or not, if the interest is afterwards paid in full, the negotiability of the bonds is thereby restored.
5. The doctrine of *lis pendens* does not apply to negotiable paper, transferred before due, in due course of business for value.

(Decided June 23, 1896.)

Error to the circuit court of Franklin county.

This action was brought in the court of common pleas of Franklin county by defendant in error Charles R. Lynde against The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., plaintiff in error, and others, to recover upon thirty-six bonds of one thousand dollars each, made in 1864 by the Columbus and Indianapolis Central Railway Company, which bonds were a part of a series
89 of one thousand bonds, secured by a mortgage on the roadway and other property of the company by which they were made. The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company by answer denied the validity of the bonds in controversy, setting forth a judicial sale and a series of consolidations of different railroad companies by which the mortgaged property became vested in it, and praying that the title to this property be quieted against the lien claimed on behalf of these bonds. Upon the trial in the court of common pleas of the issues joined between the plaintiff there and the answering defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the plaintiff prevailed, the court holding that the bonds sued upon were valid obligations of the railway company that made them and a lien upon the mortgaged property in the hands of the answering defendant. The defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, now plaintiff in error, with a view of excepting to the decision, requested the court of common pleas to state its findings of fact separate from its conclusions of law. This was done. The cause was then taken to the circuit court, where the judgment of the court of common pleas was affirmed; whereupon the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company brought the cause to this court for review. The statement of facts necessary to the decision of the case will be found in the opinion of the court.

Watson, Burr & Livesay and Lawrence Maxwell, Jr., for plaintiff in error.

Kittredge, Wilby & Simmons, for defendants in error.

BRADBURY, *J.*:

The contention between the parties assumes a twofold form. One respects the title that the defendant in error acquired to the bonds in controversy. If he acquired no title to them as against the obligor, nor against either of the consolidated companies into which the obligor became merged by the consolidation that afterwards occurred, he must fail in the action. If his title is valid
90 against the obligor or against either of the consolidated companies formed before the bonds were negotiated, then the second contention arises, which relates to the lien claimed for these bonds on the mortgaged property, this property having passed into the ownership of plaintiff in error.

The evidence discloses no marked dispute over the main facts of the case, and the trial court could have encountered no serious

difficulty in ascertaining them. Doubtless, as the defendant in error contends, the evidence submitted to the trial court would have authorized the finding of some additional facts that bear favorably for him upon a general view of the equities of the case, but their character and importance were not controlling, and in the view we have adopted they become immaterial.

The finding of fact made by the court of common pleas was both comprehensive and minute, embracing many circumstances and details formal in their character, though doubtless most of them were indispensible to a determination of the contention between the parties. It covers thirty pages of the printed record. The repetition of only a small part of this statement is required as a basis for our conclusions.

On November 1, 1864, the Columbus and Indianapolis Central Railway Company, a corporation under the laws of the States of Indiana and Ohio, authorized the execution of one thousand of its bonds, each of the denomination of one thousand dollars, payable November 1, 1904, bearing seven per cent. interest, payable semi-annually, the payment of interest being evidenced by coupons attached to the bonds severally. These bonds were duly executed, being signed by the president, attested by the secretary of the company, and the corporate seal attached. They were made payable to William D. Thompson or bearer in New York city. Each bond contained this provision: "This bond shall be transferable by delivery or it may be registered as to its ownership on a registry to be kept by the company, and, being so registered, it shall then be transferable only on the books of the company until released from such registry on said books by its owner. This bond shall
91 not become obligatory until it shall have been authenticated by a certificate annexed to it duly signed by the trustees." The bonds were secured by a mortgage conveying the roadway and other property of the makers to A. Parkhurst in trust for that purpose. It is a certificate of this trustee that is declared necessary to render them obligatory. This authentication was duly made on each bond by the following certificate: "I hereby certify that this bond is one of the series of bonds described in and secured by the deed of trust or mortgage above mentioned. A. Parkhurst, trustee." The statement that the bonds should not become obligatory until thus authenticated is equivalent to a declaration that when duly executed by the company, and so authenticated, their obligatory character shall be complete. They then become perfect in form, and by their express terms transmissible by mere delivery.

Eight hundred and twenty-one of these bonds were duly negotiated on behalf of the company. The remaining one hundred and seventy-nine, of which the thirty-six in controversy were a part, were as early as 1870 placed in the custody of Benjamin E. Smith, the president of the company, and remained in his custody until the year 1875, when, in November or December of that year, he borrowed for his own purposes certain sums of money amounting to $48,000 from W. H. Newbold, Son & Co., a firm of brokers in the city of Philadelphia, for which he executed and delivered to them

his individual notes, and at the same time, falsely pretending to the said W. H. Newbold, Son & Co. that he was individually the owner of said bonds, delivered certain of said bonds, including the thirty-six bonds described in the plaintiff's petition, to the said W. H. Newbold, Son & Co. as collateral security for the payment of his said notes.

Before the negotiation was had, the obligor, The Columbus and Indianapolis Central Railway Company, had by two separate schemes of consolidation become merged into the Columbus, Chicago & Indiana Central Railway Company, which latter corporation, by force of the consolidation had become the owner
92 of the property of the obligor, which was pledged to pay these bonds. Said Benjamin E. Smith, being continuously the president of the successive companies, *and* as such president had the bonds in his custody. This negotiation and pledging of said bonds was had without the knowledge, consent, or authority of said Columbus, Chicago & Indiana Central Railway Company.

Thereafter the said Smith renewed his said notes with the same collateral from time to time until about the 14th day of January, 1878, when the bonds so held as collateral security were sold by the said W. H. Newbold, Son & Co. and the proceeds applied to the payment of said notes and the balance paid over to the said Smith or for his use, and no part of the same was used for the benefit of said railway company.

At the time the said bonds were so pledged to the said W. H. Newbold, Son & Co. all the past-due coupons had been cut off, and while they were so held as collateral security the subsequent coupons as they came due were cut off from the said bonds and delivered to the said Smith, but the same were never presented for payment.

At the sale of said bonds the said W. H. Newbold, Son & Co. themselves became the purchasers of all said thirty-six (36) bonds, paying the full market price at the time of the purchase and buying them in good faith without knowledge of any defect in them or any of them, and thereafter they sent the said thirty-six bonds to New York for sale. Plaintiff, in the months of May, July, and August, 1878, purchased said thirty-six bonds in good faith in the usual course of business for valuable consideration, being about ninety cents on the dollar, which was at the time the usual market price for the bonds secured by said second mortgage, and without knowledge or notice of any of the unauthorized or fraudulent acts of said Smith concerning said bonds, and without any knowledge or notice that said bonds had not been sold by the said Columbus & Indianapolis Railway Company, and thereby became and is now the *bona fide* holder of said thirty-six bonds and the coupons thereto belonging, described in the petition, and that before said thirty-six bonds had been purchased by plaintiff the railway
93 company had not made default in the payment of interest on said thirty-six bonds, and no holder of said bonds prior to said plaintiff had elected that the principal sum thereof should become due.

At the time when plaintiff purchased the said thirty-six bonds the coupons belonging thereto, due May 1, 1878, were still attached to the said bonds and were unpaid.

On or about the 27th day of August, 1878, the plaintiff presented the said thirty-six bonds for registration to the secretary of the Union Trust Company, New York, which company had been therefore designated by said Columbus, Chicago & Indiana Central Railway Company as its registering agent for said bonds in the city of New York, to put the bonds in the name of the party registering them and taking them out of the register and making them to bearer, and the secretary then caused the same to be registered in the name of Charles R. Lynde. At the time of said registration no inquiry was made by the said secretary as to whether or not the said bonds had been regularly issued by the said Columbus — Indianapolis Central Railway Company.

From the year 1871 until after the purchase by the plaintiff of the thirty-six bonds described in the petition the plaintiff held and owned other bonds secured by the said mortgage of the Columbus & Indianapolis Central Railway Company to Archibald Parkhurst, trustee, described in the petition, being some of the 821 bonds hereinbefore described. The said Columbus, Chicago & Indiana Central Railway Company made default in the payment of the interest coupons upon said 821 bonds due on the first day of May, 1875, and on the first day of November, 1875, and the said interest coupons were not paid until after June 30, 1876, when the same were paid by or on behalf of the said receivers hereinbefore mentioned, all which facts were known to the plaintiff at the time he purchased the said thirty-six bonds described in the petition. No authority or consent was ever given by the board of directors of the said Columbus, Chicago & Indiana Central Railway Company to the issue or sale of the said one hundred and seventy-nine bonds or any of them.

94 The title of defendant in error to the bonds in controversy rests upon the facts thus recited. Plaintiff in error contends, among other things, that the facts thus stated show that neither the maker of these bonds nor the consolidated companies into which it became merged consented to the sale or delivery of the bonds, and as an owner cannot be deprived of his property without his consent, no title passed.

It is true that these bonds were negotiated to Newbold and Son without the knowledge or consent of the company; but such consent and knowledge is not indispensible to pass the title to negotiable instruments. Where this class of paper, complete in form and transmissible by delivery, is placed by the maker or owner in the custody of one who is thereby clothed with an apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate it to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to negotiable securities may pass by virtue of such a transaction as the finding of fact shows

occurred in respect to the negotiation of the bonds in question is, we think, clear upon principle and sustained by authority. Railway Co. *v.* Sprague, 103 U. S., 756; Fearing *v.* Clark, 15 Gray, 74.

Independantly of the rules of law designed to protect and give currency to negotiable paper, those principles of natural justice universally applicable to the affairs of mankind, when applied to this transaction, would seem to demand the protection of the defendant in error as against the maker of the bonds and all who stand in its shoes. He was wholly free from fault in connection with the transaction. Each bond contained a declaration of its transmissibility from hand to hand by mere delivery. He found them for sale, before they were due, in the market, where such securities are usually offered for sale, and bought them at their fair market value without notice of any infirmity in their title.

Soon thereafter he took them to the Union Trust Company,
95 in New York city, the agents of the makers, specially appointed to register its bonds, and caused them to be registered in his name on its books. What more could even the highest degree of prudence or diligence demand of him?

The maker of the bonds, a railway company, capable of acting through agents only, placed these bonds in the custody of its president, an agent clothed with high, though possibly not clearly defined powers. The bonds were perfect obligations, bearing on their face a certificate of authentication by the trustee and containing an express declaration of their transmissibility from hand to hand by mere delivery. He was up to and long after the time these bonds were negotiated continued as president of the different consolidated companies as they were successively formed. The companies thus held him out to the world as one who could be trusted to transact matters of importance. Under these circumstances what can be found tending to excite a doubt in the most cautious mind respecting his power to dispose of bonds so entrusted to him?

If the maker of these bonds and those who must abide by its title can shift the responsibility and consequent loss resulting from this transaction from themselves to the holder of the bonds, it must be by the application of some stern rule of law founded upon consideration of public policy.

The contention against the negotiability of these bonds rests upon a statute passed in 1820 (S. & C., 862) and in force when the bonds in question were made and negotiated:

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or or[illegible]r, or to any person or bearer, or to any person or assigns, shall be [illegible]otiable by endorsement thereon, so as absolutely to transfer and [illegible] the property thereof in each and every indorsee successively; but nothing in this section shall be construed to make negotiable any such bond, note or bill of
96 exchange, drawn payable to any person or persons alone, and not drawn to order, bearer or assigns."

In 1846 this court, notwithstanding the terms of the statute, held

in Avery *v.* Latimer *et al.*, 14 Ohio, 542, that a promissory note payable to bearer was negotiable by mere delivery, but that a sealed instrument in the same form was not a promissory note and is only negotiable by endorsement. Cushman *v.* Welsh, 19 Ohio St., 536, and Osborn *v.* Kistler, 35 Ohio St., 99, assert the same rule respecting the necessity of an endorsement to transfer title to a sealed instrument in the form of a promissory note payable to bearer.

In Avery *v.* Latimer *et al.*, *supra*, the court was of opinion that the language of the statute just quoted (S. & C., 862) was such that if it had been recently enacted its terms would have compelled them to hold that an endorsement of a promissory note was necessary to its negotiability in all instances whether sealed or not, but in deference to a long-continued practice to the contrary the court held the endorsement to be unnecessary to the transfer of a promissory note (not under seal) payable to bearer.

We think the same considerations based on a similar long-continued practice in regard to railroad bonds, together with the express declaration of transmissibility appearing on the face of the bonds in controversy, and the manifest necessity of the quality of negotiability by mere delivery to their availability to accomplish the object expected of them would require us to hold them to be negotiable by mere delivery, even if of opinion that they were sealed instruments according to the strict construction of that statute; but whatever the court might hold upon the question just suggested may be regarded as speculative, for we are of opinion that the attachment of the corporate seal did not stamp upon them the character of sealed instruments within the meaning placed upon that term by the decisions of this court before cited. Avery *v.* Latimer *et al.*, 14 Ohio, 542; Cushman *v.* Welsh, 19 Ohio St., 536, and Osborn *v.* Kistler, 35 Ohio St., 99. In those cases the instruments were made by natural persons, who signed their names and also affixed
97 or adopted a private seal, thereby man-festing a purpose to place them in the class of sealed instruments, and the court dealt with them according to the character thus expressly stamped on them by the parties.

In the case of railroad or other corporate securities, however, the attaching of a corporate seal bears a strong anaolgy to the signature of a natural person, and is its substantial equivalent. In view of the vast sums of money represented by this class of securities and of the existence of a practice of passing them from hand to hand by delivery so universal and long continued as to be within the common knowledge of every one, they should not be shorn of this valuable attribute on this account unless the words of the statute and the former decisions of this court imperatively require it, which we do not think they do. Besides, the bonds in question are payable in New York. The contract was to be performed there. All parties must be deemed to have had the law of the place of the performance of the contract in view, and we are cited to no statute or decision of the courts of that State that take- from these bonds the quality expressly given them in direct terms of transmissibility

by delivery. We therefore hold the bonds to have been negotiable by delivery.

This payment of the overdue interest was made more than two years before the purchase by defendant in error of the bonds in controversy.

Even if the holders of the bonds were chargeable with notice of this provision in the mortgage (no such provisions appearing on the bonds) and that provision was self-operating, so that a mere default of six months in the payment of an installment of interest dishonored the bonds by making them overdue, this taint should be regarded as removed by a subsequent payment of interest to the acceptance of all the bondholders, and thereafter the quality of negotiability should be deemed to be restored.

We are therefore of opinion that the title of defendant in error to the bonds in controversy is valid.

98 We now come to the question respecting the lien claimed for these bonds upon the property mortgaged to secure them, which property has passed into the ownership of plaintiff in error.

At the time Lynde purchased the bonds in controversy and for some years before he owned some of the eight hundred and twenty-one conceded to have been genuine. In 1875, more than two years before Lynde purchased those in controversy, default was made in the payment of interest on those that were genuine, and, as Lynde owned some of them, he was chargeable with notice of such default.

This default, it is claimed, rendered them overdue and therefore dishonored.

It is true that the mortgage by which the bonds were secured contained the following provision: "And it is further agreed by the party of the first part that in case the said company for the term of six months shall make default of the payment of its interest warrants or any of them, then the whole principal money contained in said bonds shall become due and payable."

The default consisted of the non-payment of the interest due for May and November, 1875, and continued until June 30, 1876, a period of more than six months. The entire interest, however, was paid on the day last named. In the meantime no steps were taken to enforce any rights growing out of this default.

The case of Baily *v.* Smith, 14 Ohio St., 396, is cited by plaintiff in error as decisively determining the question of the lien of the bonds in controversy upon the mortgaged property adversely to the claim of a lien. We are not disposed to depart from the doctrine established by that celebrated case. It has become a rule of property in this State that should not be lightly disturbed and is founded upon considerations that appeal strongly to feelings of natural justice.

That case does not deny the right of a *bona fide* holder of negotiable paper to enforce it against the maker, though the latter may have been induced by fraud to make or part with it; but it

99 does deny the right of such holder to enforce a mortgage

given to secure such paper if the mortgage also was procured by fraud. In that case the note and mortgage were both procured from the maker by fraud, and that circumstance is the predicate of the decision. What the decision might have been if fraud had intervened only in respect to one of the two instruments present in that case is a subject about which we may speculate and upon which different minds might reach opposite conclusions. The reasoning of the learned judge, as I gather it from his opinion, leads me to the belief that he would have reached the same conclusion had the mortgage alone been tainted with fraud, but possibly to a different one if the mortgage had been free from fraud though the note was so tainted.

However this may be, there are considerations growing out of the nature of the transaction in that case that distinguish it from the one under consideration. That transaction occurred between private persons and consisted of a single note secured by a mortgage on a tract of land. The learned judge, having in view those circumstances, said: "Now, mortgages are not necessities of commerce; they have none of the attributes of money; they do not pass in currency in the ordinary course of business. They are securities or documents for debts used for the purpose of investments and unavoidably requiring from those who would take them with prudence and safety an enquiry into the value, condition, and title of the property upon which they rest, nor have we the least apprehension that commerce will be impeded by requiring the further enquiry of the mortgagor whether he pretends to any defense before a court will foreclose his right to defend against those which have been obtained by force or fraud. * * * A long experience has demonstrated that they are not necessary instruments of active trade and business, and we but follow in the footsteps of the ablest and wisest judges when we say that the harsh rule which excludes equities and often does injustice for the benefit of commerce should not be applied to them. * * * If they are assigned either expressly or by legal implication the assignee takes only the interest the assignor had in the instrument." * * *

This language and course of reasoning, perfectly appropriate to the transaction then under consideration, would be strongly out of accord in discussing the principles that should determine the rights of *bona fide* holders of railroad bonds. These latter are instruments of trade and commerce in the broad sense of those terms. They are designed for sale in the money markets of both Europe and America; they are made payable to bearer for the express purpose of facilitating their negotiability. In the case of the bonds under consideration they declare on their face the fact of their transmissibility by mere delivery. The mortgage is made to a trustee for the benefit of every bond into whomsoever's hand it may chance to pass. These holders do not and cannot make such specific enquiry and examination in the condition of the mortgaged property as may be made by a purchaser of a note and mortgage under the circumstances supposed by the learned judge.

It might be entirely practicable and the dictates of prudence

might require of one about to purchase a note and mortgage of the mortgagee that he enquire of the maker the circumstances under which they originated, but to require this enquiry of one who in a distant city is about to purchase a railroad bond offered for sale in the market would be to defeat the purpose for which they were designed. Therefore we do not think the case of Baily *v.* Smith, *supra*, applicable to the case under consideration.

The roadway and other property pledged by the mortgage to secure the payment of these bonds subsequent to the making of the mortgage passed by two successive railway consolidations—one made in 1867, the other in 1868—into the ownership of a corporation known as the Columbus, Chicago & Indiana Central Railway Company. This latter railway company by the consolidations mentioned thus became the owner of the property pledged for the payment of the bonds in controversy, as well as of the property of its other constituent companies. The new company executed a mortgage on its entire property—one in February, 1868, the other in Decem-
101 ber of the same year. Under the first of the two bonds to the amount of about ten million dollars were issued, and under the other bonds aggregating less than five million dollars were issued. These two mortgages were duly recorded and no question is made respecting their validity. In 1869 the roadway and property of this consolidated company was leased for a term of ninety-nine years, renewable forever, to the Pittsburgh, Cincinnati and St. Louis Railway Company, and on or about February 1, 1869, the latter company went into possession and continued to occupy and operate the road until after its sale in 1883 upon the foreclosure of the two last-mentioned mortgages.

In 1875 actions were begun in the circuit court of the United States for the southern district of Ohio, in the circuit court of the United States for the district of Indiana and for the northern district of Illinois, by the trustees in the first of the two last-named mortgages to foreclose the same, to which action the Columbus, Chicago & Indiana Central Railway Company (the consolidated company that made the two last mortgages), the trustee in the mortgage last made, and the trustee in the mortgage made to secure the bonds in controversy were each made parties. Receivers were appointed by the court, to whom the consolidated company (the Columbus, Chicago & Indiana Central Railway Company), on May 25, 1875, conveyed the entire property covered by the mortgages pursuant to an order of court made in the actions, but subject to the right of the lessee of the road to continue in its possession, control, and management. This deed was not recorded, and the defendant in error, Lynde, had no actual knowledge of its existence until 1891. In November, 1882, decrees were rendered in these actions for the sale of the mortgaged property. By the terms of this decree the entire interest that the Columbus, Chicago & Indiana Central Railway Company, the mortgagor in the two last mortgages, had in the mortgaged property, and all the rights of the mortgagees in the two last mortgages, were ordered to be sold, free

from all liens acquired during the litigation, but the decree
102 expressly provided that it should not affect or prejudice prior liens, one of which was the mortgage made in 1864 to Parkhurst, to secure the one thousand bonds of which the thirty-six involved in this action are part.

In February, 1883, the property was sold under this decree to William L. Scott and his associates, who shortly thereafter conveyed it to the Chicago, St. Louis & Pittsburgh Railroad Company. By a consolidation of this company with the Pittsburgh, Cincinnati & St. Louis Railway Company, the lessees of the road, the plaintiff in error was formed and thereby became vested with the property embraced in the mortgage made in 1864 to secure the one thousand bonds which, as we have seen, included those in controversy.

If the equities of the defendant in error growing out of the circumstances before noticed under which the bonds in controversy were negotiated were so clearly and materially stronger than those favorable to the company that made and the company that suffered them to be thus negotiated as to authorize a decree declaring them to have a lien upon the property originally pledged for their payment, what circumstance appears in the proceedings by which this property came into the ownership of plaintiff in error that should operate to destroy this lien? The defendant in error is not chargeable with any actual neglect or omission of diligence in connection with the matter nor of any actual notice of the proceedings.

The several transfers of the property caused by the different railroad consolidations would not affect the lien, for the statutes authorizing them expressly provides that "all rights of creditors and all liens upon the property of either of such companies shall be preserved unimpaired, and the respective companies may be deemed to be in existence to preserve the same; and all debts, liabilities, and duties of either of said companies shall forthwith attach to the new company and be enforced against it to the same extent as if such debts, liabilities, and duties had been contracted by it."

103 Smith, who wrongfully negotiated these bonds, continued to be president of the several companies upon their successive consolidations until about the time of the judicial sale before mentioned, and each of them therefore became successively liable for what they carelessly suffered him to do in this matter. The circumstance that the particular railroad company that executed the mortgage and made the bonds under consideration went out of active existence before the bonds in controversy were negotiated by Smith becomes wholly immaterial in the light afforded by the provisions of this statute. The consolidated corporation succeeds not only to every debt and liability of each constituent company, but to their duties also. It therefore succeeded to all the duties pertaining to these unissued bonds that rested upon the company by whom they were made.

Respecting the effect that the judicial sale should have upon this lien independently of the rule of *caveat emptor* that is applied to purchasers at such sales, the sale under consideration was made under a decree that expressly provided that the lien of the mort-

gage that secured these bonds was not to be affected or prejudiced by the decree or sale. It is true that the purchasers at the sale supposed these bonds had not been negotiated, but they knew a thousand of the bonds had been authorized and that their form was such that they would pass from hand to hand by mere delivery, and made no enquiry at all about them. Their production and cancellation could have been demanded, and, in prudence, should have been. If their production had been demanded the fact that they were outstanding would have been revealed and the lien of the holder preserved. One who neglects so obvious a precaution should abide the consequences.

The same considerations apply to the conveyance afterward made by the purchaser at the judicial sale to the Chicago, St. Louis and Pittsburgh Railroad Company. If the purchase by Scott and his associates is not to be regarded as really made on behalf of the company to which the property was afterward conveyed,
104 nevertheless the latter received the deed without enquiry concerning the bonds in question, and it is chargeable with notice of the existence of the mortgage, the character of the bonds it secured, and that they might be outstanding in the hands of innocent purchasers.

Upon any adjustment of the equities growing out of the transaction we discover no circumstance that relieves the plaintiff in error from the rule of *caveat emptor*.

The doctrine of *lis pendens*, however, is invoked to defeat the lien of defendant in error.

In November or December, 1875, when the bonds in controversy were pledged by Smith for his personal obligation, and afterward, in 1878, when the defendant in error bought them, the actions heretofore referred to, brought in February, 1875, to foreclose the subsequent mortgages *was* pending, and the property had been placed in the hands of receivers. Under the doctrine of *lis pendens* plaintiff in error insists that the purchaser of the bonds was chargeable with notice of these actions and during their pendency could acquire no lien upon property in the hands of the court. These actions were pending in the United States court in Illinois, Indiana, and Ohio. While they embraced the property pledged to secure the payment of bonds in controversy, no relief was sought or obtained in respect to these bonds. In view of this circumstance and of the knowledge of their existence which, we have seen, should be imputed to the purchaser at the judicial sale and to plaintiff in error and their omission to call for the production and cancellation of any bonds that might not have been negotiated would make the application of the doctrine of *lis pendens* to the defendant in error extremely harsh even if the bonds were not negotiable. However, as the doctrine of *lis pendens* does not apply to negotiable paper purchased before due in due course of business, that question requires no further consideration. Stone *v.* Elliott, 11 Ohio St., 252.

The bonds in controversy were not negotiated until 1875, and if their lien dates from that event the two issues of bonds under
105 the subsequent mortgages would be entitled to a prior lien

on the property, and the ag-regate amount of those two subsequent issues was greater than the sum realized from the sale of the property under the decree of for-closure. If all that was true, the defendant in error would be entitled to demand a resale of the property, for the mortgage made to secure his bonds was not affected by the decree and sale under which plaintiff in error claims title; but the date of the lien of the bonds does not depend upon the date of their original negotiation. The entire series stand upon a footing of exact equality in this respect. The first one issued has no better or earlier lien than the last one. To distinguish between and give priority of lien among a series of railway or other bonds secured by the same mortgage and in the hands of different *bona fide* holders according to the time each may have been issued would contravene the manifest design of the maker. It would also be wholly impracticable, leading to interminable disputes, besides stamping upon each bond a doubt respecting the share of the proceeds of the mortgaged property that would be applied to its payment. If issued early, it would be paid in full, perhaps; if late, it might receive nothing.

The several propositions urged upon our consideration to defeat the claim of defendant in error we find to be unsound in principle or inapplicable to the facts as they were found by the court of common pleas.

Judgment affirmed.

SPEAR, *J.*:

I dissent from the judgment of affirmance. My point is that after a railroad corporation has become merged in a new company by consolidation with other companies it has not power to issue bonds, and thereby create a lien on the property of the new company, even though the bonds had been duly signed and a mortgage executed and recorded before the consolidation purporting to secure payment of the bonds. That is this case, as is shown by the sixth finding of fact, at page 49 of the printed Record, taken in connection with the findings recited in the majority opinion.

106 Office of supreme court reporter.

COLUMBUS, OHIO, *June* 30, 1896.

I do hereby certify this to be a true and correct copy of the opinion in the case of The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company *vs.* Charles R. Lynde as the same appears on file in my office.

E. O. RANDALL, *Reporter.*

Endorsed on cover: Case No. 16,331. Ohio supreme court. Term No., 552. The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, plaintiff in error, *vs.* The Long Island Loan and Trust Company, executor of the last will and testament of Charles R. Lynde, deceased. Filed July 8th, 1896.